NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 26
LCDT 021/10

IN THE MATTER	of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 1** Applicant
AND	**BARRY JOHN HART** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms C Rowe
Ms M Scholtens QC
Mr P Shaw
Mr B Stanaway

HEARING at Auckland on 27 August 2012

APPEARANCES

Mr P Collins for the Standards Committee of the Law Society
Mr G King for the Practitioner

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DECISION AS TO PENALTY OF THE
NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This decision on penalty is consequent upon the Tribunal's decision of 2 August 2012[1], finding the practitioner guilty of three charges of professional misconduct. The details of those charges are set out in our decision and will not be repeated here.

Penalty sought by the Law Society ("the Society")

[2] In opening, Mr Collins said that the submission that the practitioner ought to be struck off was not one made lightly by his professional body. He acknowledged that for a practitioner of some 46 years standing at a senior level at the criminal bar, this would not have been sought had any lesser response been deemed sufficient.

[3] Mr Collins went on to detail what he described as the "evolutionary nature" of the proceedings. He acknowledged that at the outset of the proceedings the nature of the charges might not of themselves have indicated that such a sanction would be necessary. However, he referred to the increasing disquiet about the practitioner, in the sense of his fitness to practise because of the manner in which the proceedings, and indeed all investigations of complaints about him, have been conducted. This when put with the previous offending history of the practitioner, meant that the Society considered it had no option but to seek strike off.

[4] In addition the Society sought a refund of $20,000 to complainant, Ms T, on behalf of her brother and her family. This was not opposed by Mr Hart.

[5] A substantial contribution was sought to the costs incurred by the Law Society in the proceedings which exceeded $116,000. In addition the Society sought reimbursement by Mr Hart of any order made under s 257 in respect of the costs of the Tribunal.

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[1] *Auckland Standards Committee No. 1 v Hart* [2012] NZLCDT 20.

[6] In his submissions Mr Collins referred to "... a pattern of culpable irresponsibility to the detriment of clients, the institutions of his profession, and the public." He submitted that the cumulative effect demonstrated that Mr Hart was not fit to remain in practice.

[7] Mr Collins went on to detail the aggravating factors which could be considered by the Tribunal in addition to the misconduct findings made by us in our decision of 2 August.

[a] The poor disciplinary history of Mr Hart. In this regard we have been provided with a lengthy affidavit by Mr Heyns of the Society setting out seven previous disciplinary findings against Mr Hart. One of these is 30 years old but is relevant in its subject matter in that it is a finding of professional misconduct for gross overcharging - that is an identical finding to the current Charge 4.

[b] More recently in 2006 Mr Hart pleaded guilty to a charge of conduct unbecoming a barrister and was censured. That related to an unprofessional verbal altercation with a fellow lawyer.

[c] In March of 2010 there was a finding of unsatisfactory conduct in respect of overcharging and "a lapse in his obligations under Rule 3 to always act competently and take reasonable care and under Rule 10 to promote and maintain proper standards of professionalism in his dealings". The Standards Committee went on to find his behaviour unacceptable measured against the standards of "competent, ethical and reasonable practitioners".

[d] Only three months after that finding there was a further finding of unsatisfactory conduct in the form of conduct unbecoming for overcharging. In respect of both of these 2010 matters Mr Hart was ordered to refund portions of his fees to the respective clients. In respect of both matters Mr Hart exercised his right to review by the Legal Complaints Review Officer ("LCRO") and, again, in respect of both matters, the findings as to overcharging were upheld.

[e] On 11 July 2011 the Standards Committee determined to take no further action in respect of a complaint by a client who had paid Mr Hart $15,000 and alleged failure to make any progress in advancing the client's instructions for a period of four and a half years.

The client sought a review from the LCRO who reversed the finding of the Standards Committee and found unsatisfactory conduct on Mr Hart's part. There were findings that he did not complete the services for which he had been retained. He failed to "promote and maintain the standards of professionalism in breach of Rule 10".[2]

The LCRO went on to make findings that the client's trust and confidence had been destroyed (a breach of Rule 5.1) and that much of the correspondence with the client contained matters which were self serving to the practitioner, and "... much of the activity that did occur was designed to give the impression that some activity was occurring on the file when in reality little of substance was being achieved". A finding of unsatisfactory conduct was made by the LCRO Mr O Vaughan. As well as a censure being administered the LCRO ordered Mr Hart to pay compensation to the client for distress and anxiety and to refund the client $10,000 of the $15,000 charged. Costs were also awarded.

[f] There were two further findings in August of this year a matter of days prior to the penalty hearing. Both of these were findings of unsatisfactory conduct by the Standards Committee in respect of Mr Hart's failure to pay expert witnesses engaged by him. In other words, identical behaviour to that found by us in Charge 1.

[2] *DN v Hart* LCRO 158/2011 at [64] (unreported).

[8] In addressing the underlying principles and authorities binding upon the Tribunal considering penalty Mr Collins referred us to both *Dorbu v New Zealand Law Society*[3] and *Daniels v Complaints Committee 2 of Wellington District Law Society*[4]. Both of these authorities were relied upon for the view that the overall conduct of the practitioner can be examined in assessing whether the practitioner is 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 ... "[5]

[9] And

> "A Tribunal, when determining ultimate fitness to remain in practice, whether limited by suspension or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it is the obvious absence of a mitigating factor and relevant to balancing matters of character.
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> In considering sanctions to be imposed on an errant practitioner, a disciplinary tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members because it is the professional with which the public must have confidence if it is properly to provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern the conduct, will not treat lightly serious breaches of standards.[6]

[10] In addressing the level of seriousness of the misconduct Mr Collins submitted that the behaviour of the practitioner in relation to Charge 1, which was found by the Tribunal to be the lower end of the range of misconduct, could be classified as dishonourable. He further submitted that its real significance, in the context of

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3 *Dorbu v New Zealand Law Society* [2012] NZHC 564 at [35].

4 *Daniels v Complaints Committee 2 of Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [32]-[34].

5 *Dorbu v New Zealand Law Society*, above n 3, at [35].

6 *Daniels v Complaints Committee 2 of Wellington District Law* Society, above n 4, at [32]-[34].

penalty, was as part of a wider pattern of serious professional failings. Mr Collins reminded us that Mr Hart had two previous unsatisfactory conduct findings for precisely the same behaviour; failing to pay a forensic scientist and psychiatrist respectively on those occasions.

[11] Charge 3, it was submitted was extremely serious, as found by the Tribunal in the 2 August decision.[7]

[12] Mr Collins submitted that this behaviour raised serious issues as to Mr Hart's fitness to remain in practice for the following reasons:

> "(a) He consistently disobeyed the requirements of authoritative institutions in his profession;
>
> (b) His conduct was wilful and deliberate; and
>
> (c) It had the effect of frustrating the disciplinary processes, as evidenced by the fact that the W file was never provided to the Standards Committee."[8]

[13] Mr Collins further submitted that membership of a profession required respect for, and obedience to, institutions of that profession and that such was entirely lacking in Mr Hart.

[14] In addressing Charge 4, Mr Collins submitted that the practitioner's attitude "... to a distressed and vulnerable family was exploitative rather than protective and there was complete disregard for the Rules of Conduct and Client Care." Mr Collins went on to refer to the "dismissive and superficial attitude to the intervention rule, the absence of any guidance or advice about fee charging arrangements, and the gross overcharging itself.

[15] It was submitted that what was disclosed by the misconduct findings of this Tribunal and the history of the practitioner was a "... consistent pattern of:

> (a) Abuse of the respondent's status as a member of the legal profession;
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> (b) Abandonment of professional responsibility to the point of contempt; and

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7 *Auckland Standards Committee No. 1 v Hart* at [56].

8 Paragraph 4.7 Standards Committee Submissions.

(c) Actual harm to the interests of the public and the standing of the legal profession."

[16] In relation to the last matter Mr Collins emphasised the total lack of insight or remorse concerning his behaviour by Mr Hart. Mr Collins submitted that this led to the view that he was "beyond the reach of professional discipline" and therefore that it was "... reasonable to conclude that he will continue to be a peril to the public, and to the legal profession, if he remains in practice."

[17] In addressing the submission that Mr Hart was responsible for extraordinary "delay and prevarication" (which had been referred to us in refusing the adjournment application of 16 July), Mr Collins set out the history of extreme difficulty experienced in obtaining discovery from Mr Hart in the course of the proceedings. In connection with Charge 4 the Standards Committee had sought access to the client file and was told in February 2011 by Mr Hart's counsel in unequivocal terms "Mr Hart does not have a file". It was then suggested that the file might have gone "with Mr Quentin Duff, who previously worked from Mr Hart's chambers ..." (and who was subsequently acting for the client concerned). This caused the Standards Committee to ask Mr Duff to undertake a complete search and to file affidavit evidence as to no file ever having been received by him and having had to obtain further discovery of the police file directly from the police. Mr Hart had been ordered by the Tribunal to provide the file on 8 February 2011. The direction was not complied with, nor were a number of subsequent directions throughout that year, until on 7 September 2011 the Standards Committee was provided with what appeared to be a full client file with correspondence and file notes. That is the file that Mr Hart's counsel had unequivocally stated was no longer with him.

[18] The Tribunal was pointed in submissions to further instances of non-compliance relating to late filing of affidavit evidence and a series of adjournment applications. The hearing itself was set down on five separate occasions and Mr Hart unsuccessfully applied for adjournments on 23 January, 1 May and 16 July 2012. One of the matters which has caused delay is numerous changes of counsel. Mr Collins drew the Tribunal's attention to the fact that by the time of the hearing Mr Hart had in fact been represented by nine different lawyers.

[19] We were also reminded that, in addition to Mr Hart's lack of representation at the substantive hearing, the hearing was made more difficult because Mr Hart had failed to make available any of his deponents for cross-examination despite a clear direction to do so on 9 February 2012.

[20] Mr Collins submitted that Mr Hart's non-appearance at the substantive hearing, without arranging for meaningful representation, was "unprecedented" behaviour for a practitioner actively in practice at the time of the disciplinary proceedings.

[21] Finally Mr Collins submitted that the overall impression when one puts all of these factors together "... is one of disarray, disrespect for the Tribunal, and disregard for professional standards".

[22] There was a striking divergence between the penalties sought by the Society, and those advocated by the practitioner.

Penalty submissions on behalf of the practitioner

[23] In addition to the oral submissions on 27 August, two further supplementary sets of submissions were filed by the practitioner and even after the penalty hearing, his counsel was seeking to delay the matter further in order to make submissions upon a matter which we had raised as one being in his interest which he ought to pursue and granted seven further days for this to be addressed. The practitioner appeared to address another matter in supplementary submissions then sought a further adjournment and time to canvass the actual decision to which he had been referred but had not obtained until provided a copy by the Tribunal.

[24] Mr King submitted on behalf of Mr Hart that striking off or suspension would be disproportionate. He submitted that costs should lie where they fall but accepted the appropriateness of an order for repayment of $20,000 to the complainant family in respect of Charge 4. Other than a brief reference to a fine, he made no submissions in respect of the other two charges and proposed not even censure, in respect of the serious misconduct found proven by the Tribunal.

[25] It was submitted that the charges did not show "incompetence, negligence or dishonesty on Mr Hart's part in the service of his clients". Mr King also referred to the

Dorbu[9] and *Daniels*[10] decisions. Mr King submitted that the gravity of the offending in those cases respectively was far more serious than anything in the present case.

[26] A further decision, *Auckland Standards Committee 3 of the New Zealand Law Society v Johnston*[11], was also submitted as more serious offending. While we accept that serious (although different) conduct was involved in *Johnston*, the approach of the practitioner in admitting most of the charges and then restructuring his practice as a way of demonstrating contrition and rehabilitation, sets it apart from the present case.

[27] Mr King submitted that Charge 4 was the most serious of the charges but that the interaction and failure to communicate with the clients was not characteristic of Mr Hart's dealings with clients, "particularly clients with whom Mr Hart has dealt since 2008". In support of this Mr Hart provided to the Tribunal a number of references (some unsigned). Some of these were from clients expressing satisfaction at the manner in which Mr Hart had represented them and as to his fees.

[28] In response to this Mr Collins made it clear it had never been the Society's case that overcharging was Mr Hart's universal practice, they merely pointed to a pattern disclosed by the unsatisfactory and misconduct findings previously established.

[29] In respect of all three matters where professionals have not been paid Mr King advised the Tribunal that all clients were legally aided and that Mr Hart had not been paid by the Legal Services Agency for these experts. He later corrected this to indicate in one of the instances he had in fact been paid but had overlooked paying the expert.

[30] Furthermore, in relation to Charge 1, Mr King pointed out that the two findings of unsatisfactory conduct which are identical to this finding are the subject of appeal to the LCRO and it was submitted they should not be taken into account. They are of course findings which currently stand until reversed by the LCRO. We do not consider we are precluded from taking account of them and the pattern which emerges from those findings.

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9 *Dorbu v New Zealand Law Society,* above n 3.
10 *Daniels v Complaints Committee 2 of Wellington District Law Society,* above n 4.
11 *Auckland Standards Committee 3 of the New Zealand Law Society v Johnston* [2011] NZLCDT 14.

[31] In his submissions in relation to Charge 3 Mr King reverted to Mr Hart's argument about reliance on the opinion of senior counsel and concerns as to client privilege. Mr King submitted this was "in the circumstances in which a client had neither brought the complainant or provided a waiver". This is inaccurate or at the very least disingenuous. The complaint was initiated by new counsel representing the client and thus privilege is deemed to have been waived by that client. Subsequent settlement of the matter and continuation of the investigation by the Standards Committee did not remove the waiver which was of course, as recorded in our decision, specifically provided by the client in any event. We will refer to further submissions concerning Charge 3 in discussion of the *Orlov v New Zealand Law Society*[12] decision later in this judgment.

[32] Finally Mr King submitted that the publicity that had accompanied these proceedings will ensure that the public is protected because the instructing solicitors and members of the public alike will be vigilant in relation to Mr Hart's charging practices.

References

[33] We note that an order for suppression of the names of referees who were former clients and subject to suppression orders themselves was sought. This is granted.

[34] Mr King submitted that the references were indicative of an advocate who was hardworking and committed and who undertook "much" pro bono work. We certainly were referred to a decision of His Honour Priestley J where Mr Hart was congratulated on his willingness to carry out pro bono work. In that instance however there is no evidence as to further work other than that, which we recognise, of his contribution on a voluntary basis to work for the Howard League for Penal Reform and his financial contribution to the costs of a speaker travelling to New Zealand for that organisation. We note that the reference of a very senior member of the profession, Mr Peter Williams QC, did not record whether the Tribunal's substantive decision had been read by him.

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[12] *Orlov v New Zealand Law Society* [2012] NZHC 2154, 24 August 2012, Heath J.

[35] Mr King went on to refer to the thousands of clients represented by Mr Hart over the years, his distinguished career, eight times appearing before the Privy Counsel and obtaining good outcomes through his dedication. Mr King referred to the team approach including junior lawyers who were provided with experience in working with Mr Hart.

[36] However Mr King conceded that the failings in his client must be in the communication and business administration areas where he was described as being a "victim of his own success". That is, that the demand for him was huge and therefore the pressures upon him increased. This was putting aside altogether the financial pressures which were referred to by at least one of his referees, as arising out of his recent property dealings and the litigation and mortgagee sales resulting from that.

[37] Mr King submitted that his client would be prepared to make the refund of $20,000 within 14 days of the hearing. As at the date of signing of this decision we are not aware whether this payment has been made.

[38] ***Charge 3 and effect of the* Orlov*[13]* *decision.*** Having been referred by the Tribunal to this decision (which was issued only late on the last working day prior to the penalty hearing), it is now relied on by Mr King to support the view that Mr Hart's conduct in relation to Charge 3 is insufficient to warrant the sanction of striking off. That is because in the *Orlov* decision His Honour Heath J directed that eight of the charges faced by Mr Orlov ought to be withdrawn as "not of sufficient seriousness to justify consideration by the Tribunal".[14]

[39] Included in these eight charges is one which was analogous to Charge 3 and it involved an allegation of misconduct based on failure to provide a file to a s 356 (transitional) committee of the Law Society. As Mr King rightly points out there is no background given in the *Orlov* decision relating to that refusal or failure to provide a file to distinguish it from the present case.

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13 *Orlov v New Zealand Law Society,* above n 10 at [121].

14 Ibid, at [121].

[40] Mr King distinguishes the decisions, to which we are about to refer of *Legal Complaints Review Officer v B*[15] and *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2).*[16] We shall deal with the issue of *LCRO v B* separately however note Mr King's submissions in relation to *Parlane* to the effect that the behaviour of the practitioner in that matter, which was described as truculent and abusive, was rightly characterised as a failure to meet the standards of integrity that ought to be met by all practitioners. Mr King submitted that Mr Hart's behaviour had not been offensive in this way, in other words that there had not been a similar level of belligerence in relation to his professional body.

[41] Mr Collins also filed supplementary submissions concerning the *Orlov* decision. Mr Collins reminded the Tribunal of its finding that Charge 3 represented "... an extremely serious breach of professional standards and most certainly reaches the level of professional misconduct".[17] Mr Collins acknowledged that this contrasted with Heath J's findings that a similar charge faced by Mr Orlov was not sufficiently serious to justify consideration by the Tribunal, a finding clearly relevant as to penalties. Mr Collins contrasted His Honour's findings with other High Court authorities. First in *Parlane*[18]*.* In that matter Cooper J referred to the seriousness of the obstruction charges in the following terms:

> "I was not referred to any case with similar facts to the present. Bolton does not specifically refer to conduct such as that of Mr Parlane in refusing to comply with the requirements of the Standards Committee to produce relevant files in response to the lawful request that he do so, thereby hindering its ability to carry out the statutory function of inquiring into complaints. I have set out the above record of what took place extensively, because it demonstrates not only Mr Parlane's wilful refusal to comply with the lawful requirements of the Standards Committee, but also shows the truculent and abusive nature of his dealings with the representatives of the Law Society.
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> That conduct was maintained over a period of a year as noted in the various charges brought against him. In my view, the conduct was such as can properly be characterised as a failure to meet the standards of integrity that ought to be met by all practitioners.
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> The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of legal services, protection of consumers of

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15 *Legal Complaints Review Officer v B* [2012] NZHC 1349.

16 *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* HC Hamilton, CIV-2010-419-1209, 20 December 2010, Cooper J.

17 *Auckland Standards Committee No. 1 v Barry Hart* [2012] NZLCDT 20, at [26]-[56].

18 *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2), above n 17*, at [52] and [106]-[109].

> legal services and recognition of the status of the legal profession. To achieve those purposes the Act provides for what is described as 'a more responsive regulatory regime in relation to lawyers and conveyancers'. The provisions of Part 7 of the Act dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirement made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives. It is completely unacceptable for a practitioner to engage in what appears to have been an abusive campaign such as Mr Parlane conducted here.
>
> The duties to which I have referred do not exist to protect the sensibilities of those involved in administering the Act's disciplinary provision. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must cooperate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification ..."

[42] That approach accords with the findings of the Tribunal in this matter and also with the second authority referred to by Mr Collins, *LCRO v B.*[19] In that matter there was also a persistent refusal to produce a file required by the Legal Complaints Review Officer. The LCRO made application to the High Court in its inherent jurisdiction to order the production, under compulsion, of the file, and sought an "unless" order to the effect that failure to produce the file would result in the practitioner's suspension from practice. In making this order and reserving the question of suspension, Her Honour Goddard J had this to say,[20] in referring to the jurisdiction being invoked:

> "Its exercise is being sought to compel compliance with the lawful directions of a duly appointed statutory authority with a specific mandate to ensure confidence in the provision of legal services and to protect the consumers of legal services. Commensurate with this is the duty of every legal practitioner to facilitate the administration of justice and to not wilfully obstruct the administration of justice by non-compliance. These submissions that there is no justifiable cause of action is not apt and his repeated failure to comply with the Legal Complaints Review Officer's lawful requests over such a lengthy period of time is effectively frustrating the review to which the complainant is lawfully entitled."

[43] And at para [45]:

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[19] *Legal Complaints Review Officer v B,* above n 16.

[20] Ibid, at [44].

> "In terms of the repeated challenge to jurisdiction, the question of jurisdiction does not and cannot arise until all of the evidence has been made available, examined and a fully informed assessment made as to whether the bill was "grossly excessive" or whether *B* had engaged in "dishonest billing" practices. In this regard, Mr Vaughan's evidence that the Legal Complaints Review Officer has jurisdiction to consider the complaint is correct. This transitional issue arose because the fee invoices preceded the commencement of the Act but it is not relevant to this Court's determination of whether, in the circumstances, it is appropriate to exercise the inherent jurisdiction of the Court that compelled *B* to comply with the Legal Complaints Review Officer's lawful requests."

[44] It is apparent from this reference that the practitioner[21] was raising the same jurisdictional arguments as Mr Hart attempted to raise in respect of Charge 3 and indeed, continues to raise in submissions in mitigation of penalty.

[45] Goddard J concluded her decision with the following further comments:[22]

> "A statutorily granted power to request documentation necessarily implies an intention that its production be compellable. In the absence of a frank power to do so, but in the light of the purposes of the Act and the fundamental obligation on *B* as a lawyer to uphold the rule of law and to facilitate the administration of justice, it is appropriate to exercise the inherent jurisdiction of this Court to order production of documents *B* has thus far failed to produce ..."

[46] The seriousness with which Her Honour regarded a failure to produce a file is readily apparent.

[47] A further important matter to which Mr Collins has referred the Tribunal in relation to the seriousness of Charge 3 is the reference to s 262 of the Lawyers and Conveyancers Act ("LCA") which creates an offence of obstruction as follows:

> **262 Obstruction**
> (1) Every person commits an offence who wilfully obstructs, hinders, resists, or deceives any Standards Committee, investigator, or other person in the execution of any powers conferred on that Standards Committee, investigator, or other person by section 147 or section 164 or section 169 or section 170 or section 172 or section 173.

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21 [Details withheld].

22 *Legal Complaints Review Officer v* B, above n 16, at [47].

[48] This offence, on summary conviction renders an offender liable to a fine of up to $25,000. In enacting this provision, with a serious penalty, the Legislature clearly considered obstruction a very serious matter.

[49] The next matter to which Mr Collins refers on this topic is the long line of Australian authority supporting the view about the participation of lawyers in the investigative or disciplinary process. Two authorities from New South Wales were referred to in the substantive decision in this matter.[23] The commentary on these decisions by Professor G E Dal Pont is contained in his text book[24] at 24.30 and 25.20, and is worthy of repetition:

> "There is a professional obligation on lawyers to promptly respond to any inquiry of the relevant regulatory body. Failing to respond, or giving false or misleading response can have disciplinary consequences more severe than those that may have attached to the misconduct being investigated, as the failure to fully cooperate may be indicative of the lack of candour or dishonesty ... In addition to responding to requests from investigators within their statutory functions and powers, there are statements at general law that lawyers are obliged to assist an inquiry into their own professional conduct, namely a duty to "cooperate reasonably in the process". Such an inquiry should not be viewed as if the investigator was "prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues". The disciplinary jurisdiction has been described as "a special one", not one in which the lawyer may "lie by and engage in a battle of tactics".[25]
>
> The duty to assist does not mean that the lawyer must disregard his or her own interests - in any case the lawyer must be accorded natural justice ... - but that as the lawyer often has a better knowledge and understanding of the matter the subject of the complaint than the complainant, the investigator relies heavily upon the lawyer's cooperation and candour."

[50] And at 25.20:

> It follows that an attitude lacking in candour in disclosures in respect of any legitimate inquiry in a lawyer's professional conduct, whether or not the lawyer believes the complaint to be well founded, can clearly impact upon the severity of a disciplinary response. Moreover, it should be noted that being obstructive to the course of the investigation is no difference in substance, disciplinary sanction-wise from making misleading statements to the investigator(s)."

[51] With the greatest of respect, we consider the significant weight of authority to be against the approach taken in the *Orlov* matter in terms of seriousness of the offence

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23 *Legal Complaints Review Officer v* B, above n 16, at [53] and [54].
24 G E Dal Pont *Lawyers' Professional Responsibility* (4th ed. Law Book Co of Australasia, 2009)
25 *Re Veron* (1966) 84 WN (Part 1) NSW 136 at 141.

of obstruction. We prefer to follow the approach taken in *Parlane* and *Legal Complaints Review Officer v B*, together with the Australian authorities. Whilst we acknowledge that the belligerence shown by Mr Parlane to the professional body was much more overt than in the present case, we consider that the more subtle belligerence demonstrated by the evasiveness, delays and lack of cooperation in this matter by a senior member of the profession, was just as pervasive and with the same effect of frustrating the disciplinary process.

LCRO v B

[52] [Details withheld].

Discussion

[53] We wish to comment on some of the submissions made by Mr King on behalf of the practitioner. First the submission that publicity surrounding this case provided deterrent and protective factors for the practitioner and public respectively. We reject that submission. To accept it, would shift the responsibility from the practitioner to those with whom he deals. Furthermore, implicit in the submission is the recognition that the public do indeed require some warning about him. We consider that to accept the submission would give completely the wrong message to the public whom we are obliged to protect in terms of the purposes of the LCA.

[54] We are absolutely clear that no lesser intervention (such as fine or censure) would properly reflect the seriousness of the misconduct overall in this case.

[55] Furthermore we make it clear it is not the Tribunal's function to make a distinction between a practitioner who is in the public eye and one who is not, in terms of how the public might be protected. We note that the statement that it was "not beyond his ability to change" appears to be the only glimpse of any form of acknowledgment of wrongdoing by the practitioner. We note that contrition is entirely absent.

[56] As to the submission that striking off or suspension would be disproportionate, supported by reference to other cases, as recorded in paragraph [25] whilst we accept that consistency is important in the Tribunal's penalty decisions, it is trite to

record that every case heard by the Tribunal has enormous factual differences and factors which must be taken account of, including previous disciplinary history.

[57] This is the first case of gross overcharging considered by the Tribunal since the LCA came into effect. It is very difficult to compare this case with any other than *Parlane* in terms of a practitioner's complete failure to engage with his profession.

[58] We do not consider it is proper to analyse each of the charges separately as was the approach advanced for the practitioner.

[59] We consider the three most salient features of this matter to be:

[a] A combination of the three types of professional misconduct found.

[b] The practitioner's previous lengthy disciplinary history.

[c] The lack of remorse shown by the practitioner.

[60] We consider that the total overview of Mr Hart's conduct and of his conduct of the proceedings leaves us to the inevitable view that the public require protection from him. That means that there are three possible outcomes:

[a] Suspension;

[b] Strike off; or

[c] Practise under supervision.

[61] In relation to the last option, we note there was no such proposal from the practitioner or any person put forward who could be responsible for such supervision. At the practitioner's age and stage in his professional career, and given his approach to these charges, we do not consider this to be a viable option.

[62] The balancing exercise required in a penalty decision such as this is usefully set out in *Daniels*[26]:

> "The starting point is fixed according to the gravity of the misconduct, and culpability of the practitioner for the particular breach of standards. Thereafter, a balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner. Obviously, matters of good character, reputation and absence of prior transgressions count in favour of the practitioner. So too would acknowledgement of error, wrongdoing and expressions of remorse and contrition. For example immediate acknowledgment of wrongdoing, apology to a complainant, genuine remorse, contrition, and acceptance of responsibility as a proper response to the Law Society inquiry, can be seen to be substantial mitigating matters and justify lenient penalties ..."

[63] Certainly this is what happened in the recent decision of *Auckland Standards Committee No. 1 v Fendall*[27] where the practitioner immediately admitted the charge of misconduct, having already made amends for her transgressions. On appeal against the decision of the Tribunal not to suspend the practitioner, His Honour Wylie J reminded himself[28] that:

> "The penalty regime available to the Tribunal under the legislation does not have as its primary purpose punishment, although orders inevitably will have a punitive effect as well. The predominant purposes are to advance the public interest, which includes protection of the public, to maintain professional standards, to impose sanctions on a practitioner for breach of his or her duties, and to provide scope for rehabilitation in appropriate cases. One commentator has observed that the main purpose served by disciplinary proceedings is protective, and that disciplinary proceedings aim to protect members of the public from misconduct by lawyers."

[64] *Daniels*[29] provides contrast in a situation where there is a lack of remorse:

> "[29] On the other side of the coin, absence of remorse, failure to accept responsibility, showing no insight into misbehaviour, are matters which, whilst not aggravating, nevertheless may touch upon issues such as a person's fitness to practise and good character or otherwise.
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> [30] If a practitioner engaged, for example, in disreputable correspondence with a complaints committee or disciplinary tribunal, or conducted himself in a belligerent way in which he responded to legitimate complaints made to a Law Society Complaints Committee, a tribunal may take a dim or adverse view of his overall behaviour. The practitioner cannot expect that to be a factor that is ignored in the exercise of the tribunal's power. That is because character -

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26 *Daniels v Complaints Committee 2 of Wellington District Law Society,* above n 4, at [28].

27 *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825, 2 August 2012, Wylie J.

28 Ibid, at [36].

29 *Daniels v Complaints Committee 2 of Wellington District Law Society,* above n 4, at [63].

> good or bad - may be very relevant when sanctions or penalties may come to be imposed.
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> [31] To maintain innocence, which carries with it denial and absence of remorse, relates to absence of potential mitigation but not as a matter of aggravation. But there may be behaviour which detracts from positive character features advanced in mitigation
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> ...
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> [32] A tribunal, when determining ultimate fitness to remain in practise, whether limited by suspension, or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it is the obvious absence of a mitigating factor and relevant to balancing matters of character.
>
> ...
>
> [34] In considering sanctions to be imposed upon an errant practitioner, a disciplinary tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards."

[65] In the *Daniels* decision having referred to *Bolton v Law Society*[30] the full Court held that the Tribunal had been "... justified in expressing disquiet about the lack of remorse of the appellant, which remains apparent from his affidavit and statements ..." and further[31] "the critical element in this case was the finding that the complainant was vulnerable and exploited".

[66] We have made similar findings of vulnerability, in the present instance, in relation to Charge 4.

[67] We consider that the evidence in these proceedings has disclosed a lack of integrity on the part of this practitioner. Furthermore we do find it dishonest for Mr Hart to have been paid by the Legal Services Agency and then not pay the expert, as

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[30] *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492.

recorded in his sixth previous disciplinary matter[32]. Initially Mr King submitted that this had not occurred but had to correct the position later in his submissions.

[68] We accept that striking off; particularly in a practitioner of such seniority is a last resort response. We have grappled as to whether a significant period of suspension would suffice. The essential issue is whether the practitioner is a fit and proper person weighing all of the conduct discussed. Likelihood of rehabilitation is also relevant to suspension considerations.

[69] Had Mr Hart approached the various investigations in these proceedings differently, and had there been a less serious recent disciplinary history, suspension would have been the option adopted. But the arrogant and derisory manner in which he has approached any complaint - right up to the penalty hearing where he attempted to defend his failure to produce yet another file for inspection following a complaint, has meant that we can have no confidence in either his rehabilitation or protection of the public by ensuring there is no risk of reoffending. The practitioner's approach is crucial as discussed in our review of the *Fendall* decision where the practitioner's fulsome acceptance of responsibility clearly had a strong role in the Tribunal adopting which could be described as a very compassionate penalty (upheld on appeal).

[70] By comparison Mr Hart sought to justify his failure to produce files to his disciplinary body right to the end of his penalty hearing. We have referred to the delay and prevarication and the difficulties in discovery. We consider that there was a deliberate advance attempt to frustrate the hearing in July by not having witnesses available, including advanced arrangements for video conferencing of the expert which had been previously approved by the Tribunal. This demonstrates not only a pattern of obstruction but also a lack of remorse and inability to change.

[71] [Details withheld].

[72] We accept Mr Collins' submissions that Mr Hart's attitude to a distressed and vulnerable family was exploitative and that there was a lack of integrity in his whole approach to the family, demanding payment of large sums of money without clear

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[31] *Daniels v Complaints Committee 2 of Wellington District Law Society,* above n 4, at [37].

communication as to how this was to be applied, and what work would be undertaken.[33]

[73] We put these factors against the mitigating factors put before us. We have noted his pro bono and Howard League contributions. This practitioner has had a long career where many of his clients refer to "good" outcomes. We do however note that mere advocacy with fierce determination is not to be confused with "the discharge of ... professional duties with integrity, probity and complete trustworthiness" (*Bolton*[34]). The flavour of the submissions in mitigation and the references provided was that because there was hard work and determined advocacy, that this equated with integrity. We disagree and do not consider that these positive attributes compensate for the deficits demonstrated repeatedly over a long period of time. Mr King's submission that the practitioner "could change" is contradicted by his other submission that it is understandable that someone who has had years of experience of taking every point to advance a client's position might not fall into line when his own behaviour is challenged. It also fails to take account that, at most times, Mr Hart has had legal representation. The submission is insufficiently reassuring when set against the pattern of behaviour demonstrated by previous offending and the manner of conduct in each of the disciplinary processes in which he has been involved.

[74] Having weighed all of the evidence and submissions it is the Tribunal's unanimous view that the practitioner is no longer a fit and proper person to practise as a barrister or solicitor.

Costs

[75] Given the protracted nature of these proceedings it is not surprising that there have been very significant costs incurred. As noted by Her Honour Winkelmann J in the course of the review proceedings:[35]

> "Investigations which led to at least one of the charges began in 2008. Since then there have been long periods of delays. Most of the delay has been

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[32] See para [8][f] herein.
[33] *Auckland Standards Committee No. 1 v Hart,* above n 1*,* at [141].
[34] *Bolton v Law Society,* above n 34, at [65].
[35] *Hart v Standards Committee No. 1*, HC Auckland, CIV-2011-404-7750, 16 February 2012, Winkelmann J.

> attributable to Mr Hart. There have also been three previous adjournments of the disciplinary hearing, two of which were at the request of Mr Hart."

[76] Mr Collins pointed out that the early non-compliance with discovery by Mr Hart led to a chain of events involving the Judicial Review Proceedings and the subsequent necessity to appoint a further costs assessor on the appointment to the District Court Bench of the original costs assessor. Had the matter proceeded along a normal course this would not have had to have occurred. The case has occupied over five days of hearing time together with six case management teleconferences. Full trial preparation was required on two occasions.

[77] The Society's costs are $116,429. The Tribunal does not have direct evidence of the practitioner's financial circumstances. His financial circumstances have of course been the subject of publicity which was referred to by his counsel in the course of submissions as well as two of his referees, one of whom referred to his "financial ruin". Mr Hart indicates there are no bankruptcy petitions against him at this stage and indeed he is confident that as a result of future Court proceedings his financial position will be recovered. He did not provide either a declaration as to his financial means or any calendar of his future engagements. Having regard to Mr Hart's actions in prolonging this matter, and our findings on the charges, we consider that there ought to be a contribution by the practitioner to the Law Society's costs of 85% of the actual costs.

[78] In relation to the Tribunal costs which will be ordered to be paid by the New Zealand Law Society we consider a further order ought to be made that 100% of those costs should be recovered from the practitioner.

Orders

[a] There will be an order striking the practitioner Barry John Hart from the Roll of Barristers and Solicitors, s 244(1) and (2).

[b] There will be an order that he pay 85% of the Standards Committee's costs of $116,429, s 249.

[c] There will be an order that the New Zealand Law Society pay the Tribunal costs of $45,000, s 257.

[d] There will be an order that the practitioner refund to the Society the s 257 costs of the Tribunal in full, s 249.

[e] There will be an order by consent that the practitioner pay by 10 September 2012 the sum of $20,000 to the A Family, complainants in respect of Charge 4, s 156(1) (e) and (g) and s 242.

[f] There will be a suppression order relating to the names of the complainants generally and to the clients in the references provided by Mr Hart, s 240.

DATED at AUCKLAND this 14th day of September 2012

Judge D F Clarkson
Chair