NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 30

LCDT 011/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **WELLINGTON STANDARDS COMMITTEE**
Applicant

AND **GUY WILLIAM DAVID MANKTELOW**
of Wellington, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr J Clarke

Mr P Radich

Ms P Walker

HEARING at Wellington on 9 October 2012

APPEARANCES

Mr K Johnston for the Law Society

Mr I Millard QC for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The Practitioner, Guy William David Manktelow, has admitted one charge of professional misconduct, as described in the seven supporting particulars to the charge. The charge and particulars are annexed as Appendix 1.

[2] The matter proceeded as a penalty hearing during which the practitioner answered questions from the Tribunal, but was in other respects a submissions only hearing. At the conclusion of the hearing the Tribunal suspended the practitioner for 12 months commencing 23 October, censured him and imposed costs orders. We reserved the reasons for our decision. This judgment contains those reasons.

Background

[3] The Practitioner Guy William David Manktelow is aged 51 and married with one child aged 11 years. He was admitted as a Barrister and Solicitor of the High Court in New Zealand in 1984 and has practised as such ever since. From 1993 he has practised on his own account. Since 1997 he has been in partnership with his brother Toby George Amos Manktelow. The Practitioner's practice was in Lower Hutt. His brother's practice in the same partnership was in Palmerston North. The two practices were small practices with that of the Practitioner being made up of himself and one longstanding staff member who gave general support. Each of the practices in Lower Hutt and Palmerston North concentrated on civil litigation, often estate type litigation.

[4] The practice maintained a Trust Account where at any one time the volume of client funds was relatively small. The Trust Account was operated using a manual handwritten system and this system was operated by the Practitioner. It was he who was responsible for the observance of correct practices in relation to the Trust Account and for the giving of accurate and truthful reports to the New Zealand Law Society ("the Society") concerning the Trust Account.

The Charges

[5] On 15 June 2012 the Practitioner was charged with misconduct pursuant to s 7(1)(a) and (b) of the Lawyers and Conveyances Act 2006 ("the Act"). The essence of the charges was that on numerous occasions the Practitioner allowed the firm's Trust Account to be overdrawn and that on many occasions he gave false certificates to the New Zealand Law Society as to the state of the firm's Trust Account. This occurred for a period of almost two years.

[6] The Practitioner readily and promptly admitted all of the charges.

The Trust Account

[7] A solicitor's Trust Account is an account in which clients funds are accumulated and held in trust. Careful records need to be kept showing the individual entitlements of clients to funds within the account. Subject to correct procedures being followed, a lawyer is entitled to take his or her fee remuneration or to recover disbursements from client monies held in trust. Those entitlements of the practitioner are assembled in a Costs Account within the Trust Account. Monies can then be taken by the practitioner from the Costs Account for the purpose of meeting the needs of the firm and the needs of the practitioner. In the case of the Practitioner the breach in relation to the overdrawing of the Trust Account was explained in a report by the Society's inspector as follows:

> The overdrawn account occurred as fees in excess of the amount deducted from the clients had been transferred to the practice bank account. The effect of the overdrawn Costs Account is that there is insufficient funds in the Trust Account to meet client credit balances.

[8] The Society has a system for the supervision of Trust Accounts which relies heavily on the honesty and accuracy of practitioners in relation to their Trust Accounts. Monthly certificates are required to be given to the Society advising whether or not the practitioner's Trust Account has been managed in accordance with the Rules. The Practitioner gave monthly certificates saying that all was in order when in fact it was not.

[9] As a further part of the supervision system of the Society, inspectors appointed by the Society visit law firms from time to time and examine their Trust Account practices. On previous occasions from 2007 onwards inspections of the Practitioner's Trust Account had shown that the Trust Account was not being managed properly and these deficiencies were drawn to the attention of the Practitioner orally and in writing. Further visits by the inspector to the practice between 29 February and 6 March 2012 revealed that the practice of overdrawing the Trust Account was continuing and as a result of those visits the charge which is now before us was laid.

[10] What has happened is that the Practitioner has taken for the purposes of his firm or himself more money from clients than the costs that he had rendered at that point allowed. The maximum amount overdrawn in the period to which the charge relates was $33,136.02.

[11] In this "borrowing" from the Trust Account, clients do not suffer any actual loss unless the monies are not "repaid". The risk to the clients is that if at any point in time all clients wanted the money out of the Trust Account to which they were entitled there would be a deficit to the extent of the overdrawing by the practitioner.

[12] There can be no hiding from the fact that what happened here is that the Practitioner used clients' money which he was not entitled to use. No client has suffered any loss and it appears unlikely that any loss would have been suffered. That however does not diminish the seriousness of what happened. The seriousness of what happened is that the Practitioner crossed a line which no practitioner should ever cross and used clients' money without authority and to meet the pressing needs of the practice. Moreover, the Practitioner then gave false certificates to the Society in which the Society was assured that everything in relation to the Trust Account was in order.

Our Assessment of the Practitioner

[13] The Practitioner appears to be a person who, somehow, came to be conducting his practice according to two different sets of standards. In his professional work he appears to have been capable and diligent. He appears to have been supportive of

clients who needed support and generous and considerate in the sense of working professionally for long periods when clients who could not afford to meet his fees were unable to do so until some result from the litigation which was being conducted eventuated. He was prepared to do work for clients on legal aid when many practitioners are unwilling to do this on account of the administrative demands and the lesser returns that come from such work. There has been no suggestion before us that in his professional work for clients the practitioner was anything other than a dutiful and capable lawyer. We were told that, in Lower Hutt, a capable lawyer willing to do legal aid work was a rarity.

[14] Then, on the other hand, we have the picture of the Practitioner neglecting the financial management of his practice. His Trust Account administration which he did himself appears to have been done reluctantly and under pressure. The consideration for clients and the support of clients who could not immediately pay for services had the consequence of inadequate cash flow within the practice. And this then had the consequence where the Practitioner "borrowed" clients' monies by overdrawing the Trust Account to meet immediate needs. The Practitioner then seemed to have been able to persuade himself to complete the Trust Account certificates to the Society in a way that showed everything to be in order when it was not.

[15] In evidence, the Practitioner described that there were many entries in the trust account, particularly for a client for whom debt collection was undertaken, which were small and frequent. This made the task of a handwritten ledger particularly onerous. It seems the practitioner was so relieved at the point of reaching balance in the ledger, that he did not pay proper attention to the means by which this was achieved (in contrast to the *Hawke's Bay Lawyers Standards Committee v Hancock*[1] case to which we later refer).

[16] We think that the Practitioner somehow set proper standards aside and persuaded himself to breach these standards. People who do this can sometimes accommodate what they are doing within their consciences by not seeing what they are doing in its true light. They persuade themselves that no harm is done and that

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[1] *Hawke's Bay Lawyers Standards Committee v Brian Hancock* [2011] NZLCDT 39.

money used temporarily will be repaid. This sort of self persuasion is a seriously false persuasion as it does not recognise the real harms.

[17] The real harms are several. First, there is the breach of a client's trust when a lawyer uses client's money the lawyer is not entitled to use. It is the crossing of a line which should never be crossed. Secondly, there is the damage to the reputation of the profession when a practitioner does this without authority even if there is no loss to the client. Then there is the risk that the line once crossed becomes easier to cross and smaller amounts of "borrowings" become larger until the point is reached where there is actual loss. Then there is the harm done to the integrity of the Society's Trust Account supervision system which is heavily reliant on trust and which is undermined when trust is abused.

[18] It is apparent that the Practitioner allowed himself to carry on with these practices, minimising the seriousness of them in his own mind. We accept that when he was confronted with the charges the effect was cathartic. We are satisfied from having seen and heard the Practitioner give evidence before us that he is very remorseful and feels a sense of shame having let down his clients, his family and in particular his brother, his colleagues and himself.

Submissions for the Standards Committee

[19] Mr Johnston, for the Standards Committee, began by summarising the primary purpose of professional disciplinary proceedings. He submitted that these could be considered under three headings:

[a] Protection of the public;

[b] The maintenance of professional standards; and

[c] Punishment and rehabilitation (if appropriate).

[20] Accepting that there was no risk directly to the public posed by this practitioner, who had immediately closed his Trust Account, Mr Johnston directed his submissions on penalty to the wider view of "public protection". That is, public protection by way of deterrence for members of the profession, to signal zero tolerance of these types

of breaches, by a profession which seeks to be regarded as completely trustworthy. He submitted that a penalty short of strike-off would fail to achieve these objectives.

Submissions for the Practitioner

[21] Mr Millard QC reminded us that the penalty of striking off is a last resort one. He urged the least restrictive outcome, relying on decisions in *Daniels v Complaints Committee 2 of the Wellington District Law Society*[2] and *National Standards Committee v Poananga*[3]. In conducting the balancing exercise of assessing the practitioner's fitness to practice, having regard to the nature and seriousness of the misconduct, Mr Millard argued that there was "*a countervailing public interest in not ending the career of a competent lawyer*".

What to Do

[22] In terms of s 244(1) of the Act, in order to effect a strike-off of the name of the Practitioner from the Roll of Barristers and Solicitors of the High Court, each member of this Tribunal must be satisfied that the Practitioner is not by reason of his conduct a fit and proper person to be a practitioner. The expression "fitness to practice" raises two different concepts. One is fitness in the sense of being able to do the tasks associated with the practise of law. The other is fitness in the sense of being a person who can appropriately be allowed to undertake the tasks which he or she is capable of doing in an operational way. There are circumstances where a practitioner may well be able to undertake the tasks in an operational way but because of his or her conduct, is no longer a person who should be permitted to have the standing of a lawyer. It is the second category of fitness that concerns us here.

[23] In a similar case *Hancock*[4] the name of the practitioner was struck from the Roll on account of Trust Account irregularities of a similar kind. No two cases are ever the same and, ultimately, we have seen that case as being marginally distinguishable from the case before us. In particular, the practitioner in that case had sought to conceal his overdrawing by keeping blank trust account receipts and completing them retrospectively. We consider that to have been a more deliberate and

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[2] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[3] *National Standards Committee v Atareta Poananga* [2012] NZLCDT 12.
[4] *Hawke's Bay Lawyers Standards Committee v Brian Hancock,* above n 1.

manipulative means of concealing the breach. Moreover, the misconduct continued for in excess of four years. However, it has to be said that that practitioner, like Mr Manktelow, did not act dishonestly for personal gain.

[24] In the present case we have decided not to remove the name of the Practitioner from the Roll. We have to say that at one stage we were of a mind to do so but that ultimately, after careful and anxious consideration, we decided on a different outcome.

[25] We have been influenced by the standing which the Practitioner has as a practitioner, apart from these matters. He has the respect of his colleagues in Lower Hutt and evidence to that effect was put before us. He provides a professional service to a section of the community in Lower Hutt which is valued, and, seemingly, appreciated. In all parts of his professional and personal life apart from the matters before us, the Practitioner appears to be a decent person.

[26] No loss to clients eventuated and there appears to have been no immediate likelihood of any loss. The Practitioner has given an undertaking that if allowed to continue to practise in the future he will not operate a Trust Account. We therefore think that the part of the Practitioner's professional life which has produced these serious problems will be removed.

[27] We are satisfied that the Practitioner now understands the gravity of what he did, understands the reputational damage he has done to the profession and indeed to himself and others around him. We are satisfied that there is no appreciable risk in allowing the Practitioner to practise in the future.

[28] The removal of the name of the Practitioner from the Roll is a serious step. It means that his livelihood is taken from him permanently unless subsequent restoration can be achieved. It means that heavy impacts fall upon other innocent people including family and staff. It means that clients lose the services of a practitioner who may be able to continue to give public service. It is not something to be done if there is some alternative which will meet the needs of the public and the profession.

[29] In this case, as we have said after anxious consideration, we are satisfied that a suspension of the Practitioner from practice for a period of one year in conjunction with the other orders which we made will be an appropriate outcome in this case. While this is a benevolent outcome it is one which we recognise will have severe impacts on the Practitioner, his family and his clients but these are unavoidable.

Orders

[a] The practitioner is suspended for a period of 12 months from 23 October 2012, pursuant to s 242(1)(e);

[b] The practitioner is censured;

[c] The practitioner is to reimburse to the New Zealand Law Society costs in the sum of $15,000;

[d] The New Zealand Law Society is to reimburse the Crown for s 257 costs in the sum of $4,600.00.

[e] The practitioner to reimburse the s 257 costs of $4,600.00 to the New Zealand Law Society, pursuant to s 249;

[f] These outcomes have been on the basis of the undertaking given by the Practitioner in relation to the operation of a Trust Account. This undertaking should be re-formalised as follows:

[i] It should be in writing and addressed to the New Zealand Law Society;

[ii] It should be to the effect that the Practitioner will not be involved in the establishment or operation of a Trust Account for client funds without the consent in writing of the New Zealand Law Society.

DATED at AUCKLAND this 16th day of November 2012

Judge D F Clarkson
Chair

Appendix 1

THE WELLINGTON STANDARDS COMMITTEE 1 ("Complainant") **HEREBY CHARGES GUY WILLIAM DAVID MANKTELOW** ("Practitioner") with **MISCONDUCT**, pursuant to s 7(1)(a) and (b) of the Lawyer and Conveyancers Act 2006 ("Act"), particulars of that **CHARGE** being as follows:

1. AT all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand, and held a current practising certificate;

2. AT all material times the Practitioner was and is in practice as a principal in the firm of Guy & Toby Manktelow ("Firm"). Aside from the Practitioner, the other principal in the Firm was (and is) Toby George Amos Manktelow. The Firm has offices in the cities of Lower Hutt and Palmerston North. The Practitioner practises primarily from the Firm's office in Lower Hutt. Toby Manktelow practises primarily from the Firm's office in Palmerston North;

3. AT all material times the Practitioner was the Firm's Trust Account Supervisor as defined in r 16(1)(b) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 ("LTAR"). He was the partner responsible for the day to day operation of the Firm's Trust Account;

4. ON divers days commencing on or about 20 April 2011, the Practitioner, in his capacity as the Firm's Trust Account Partner, arranged for the transfer of funds from the Firm's Trust Account to its Practice Account, knowing that the funds in the former were insufficient to cover the transfers and that the transfers would therefore result in the overdrawing of the Firm's Trust Account;

5. IN his capacity as the Trust Account Supervisor, on divers days between 22 February 2010 and 28 February 2012 the Practitioner allowed the Firm's interest or costs account in the Firm's Trust Account to be overdrawn;

6. IN his capacity as the Trust Account Supervisor, on divers days between February 2010 and January 2012, the Practitioner signed Certificates pursuant to r 17 of the LTAR and caused those Certificates to be forwarded to the Complainant which the Practitioner knew or ought to have known to be false;

7. THE actions of the Practitioner as particularised herein took place in the course of the Practitioner providing regulated services as defined in s 6 of the Act.

The Practitioner's actions as particularised herein amount to misconduct as defined in s 7 of the Act being conduct:

- That would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable (s 7(1)(a)(i)); and/or
- That consists of a wilful or reckless contravention of the LTRA (s 7(1)(a)(ii)).