NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 30

LCDT 036/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER OF **EDWARD ERROL JOHNSTON** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr S Morris

Mr T Simmonds

Mr W Smith

HEARING at AUCKLAND on 26 July 2013

APPEARANCES

Mr M Hodge, for the Standards Committee

Mr E Johnston, the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] Mr Johnston has pleaded guilty to a detailed charge, in amended form, alleging misconduct on the basis of "disgraceful or dishonourable conduct in the course of providing regulated services and/or wilful or reckless contravention of provisions of the Lawyers and Conveyancers Act 2006 (LCA), LCA Trust Account (Regulations) 2008, and LCA (Lawyers: Conduct and Client Care) Rules 2008".

[2] The charges are detailed and are set out as an appendix to this decision.

[3] At the outset of the penalty hearing Mr Johnston indicated that he did not oppose the order striking him off the roll of barristers and solicitors which was sought by the Standards Committee.

[4] Because of that concession the hearing was able to proceed in a somewhat truncated form, at the conclusion of which the Tribunal made the order striking off the practitioner, and reserved its reasons for decision and decision on the issue of costs. This is that reserved decision.

Background

[5] The offending which led to these charges surrounds Mr Johnston's representation of and interaction with a family trust involving trustees and beneficiaries who had been longstanding family friends of his. Under consideration were two advances from them to Mr Johnston personally or his company in the sum of $250,000 each. The first was to purchase shares in a company owned by Mr Johnston, although the share purchase was never perfected. The second was a loan essentially to purchase a property. However, as acknowledged by Mr Johnston, the funds never made their way to this purchase.

[6] Ultimately the bulk of all of these funds have been lost to the client since, although Mr Johnston has signed acknowledgments of debt in relation to each of the

advances, he is now an undischarged bankrupt and is currently unable to meet his obligations.

[7] In undertaking these transactions and in his representation of these clients Mr Johnston has broken almost every rule one could imagine in representing a client wishing to make a financial investment. He failed to obtain independent legal advice for them. He did not provide proper advice on the risks entailed in the investments. He failed to provide any or proper documentation. Furthermore he painted what has been described as a very rosy picture of the investment as set out in Mr Hodge's submissions as follows:

> "2.16 At all times, Mr Johnston advised the trustees that both investments were:
>
> (a) Safe and secure;
>
> (b) For the purposes of bridging finance needed by the Practitioner and that would be easily replaceable; and
>
> (c) That the investments would make a good return over a short period."

[8] There was no possibility of the practitioner repaying as he had assured given, as detailed in the report filed by one of the Law Society's witnesses, Mr Maffey, the monies had been committed elsewhere.

[9] The specific rules and regulations breached are set out in the annexed charges and we do not propose to repeat them at this point.

[10] Mr Johnston expressed enormous regret at what had occurred, and furthermore expressed a determination to eventually put things right with his former clients. Mr Johnston accepted that strike off was inevitable given his repeated failures, particularly in the area of acting in conflict of interest both between clients, and between himself and clients.

[11] These issues were addressed in a decision of the Tribunal of May 2011. On that occasion Mr Johnston also expressed remorse and intention to modify his behaviour to fall within proper professional boundaries.

[12] In that decision we remarked upon a concern as to a lack of candour on Mr Johnston's part in the reporting of certain matters to the Standards Committee. However, we were prepared to give him the benefit of the doubt. The Tribunal also extended considerable leniency to Mr Johnston on his previous appearance, stepping back from an order suspending him from practice, and simply imposing a censure, fine, and orders as to supervision by a senior practitioner.

[13] What the Tribunal did not know, and what Mr Johnston failed to disclose, was that at that very time he was attempting to negotiate a resolution of the matters that now bring him back before the Tribunal.

[14] Such blatant disregard of the strong professional obligation for openness in dealing with the institutions involved in the disciplinary process is absolutely unacceptable.

[15] As stated in *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*[1] such behaviour towards one's professional body "*... must be part of the assessment by the Tribunal as to whether a practitioner is a fit and proper person to continue to practise as a barrister and solicitor."*

Previous disciplinary history

[16] In addition to the Tribunal finding noted above, since August 2008 when the new disciplinary legislation came into force Mr Johnston has also had a finding of misconduct by the Legal Complaints Review Officer, and four findings of unsatisfactory conduct by the Auckland Standards Committees.

[17] The principles concerning matters which must be established to justify striking off a practitioner are now relatively well settled. In *Dorbu v New Zealand Law Society*[2] it was held:

> 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

[1] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, Winkelmann J & Lang J.
[2] *Dorbu v NZLS* [2012] NZAR 481 (HC) (Miller, Andrews, Peters JJ).

> risk of reoffending and the need to maintain their reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice.[3]

And in *Hart*[4] at paras [186] and [188] – [189]:

> [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 may 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 practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
>
> ...
>
> [188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.
>
> [189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[18] The last-quoted paragraph is particularly apposite in the present matter. Mr Johnston has, on repeated occasions, failed to understand that he cannot behave in an entrepreneurial manner using his clients' funds as the basis for funding his various and ambitious money making schemes. The oft-quoted extract from *Bolton v Law Society*[5] that a client must be able to trust his lawyer "to the ends of the earth" was never more apt than in the present case. Sadly, the now deceased and long-time friend of the practitioner trusted him implicitly. Mr Johnston did not well repay that trust. He breached the fundamental principle that a lawyer must always put the interests of his clients ahead of his own.

Decision

[19] Regardless of the practitioner's lack of opposition, the Tribunal is required to unanimously decide that he is not a fit and proper person to be a practitioner before making an order pursuant to s 242(1)(c). We confirm that for all of the above reasons we consider that no order short of a striking off order would sufficiently reflect the seriousness of the current offending, the practitioner's previous disciplinary

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[3] Above n 2, para [35].
[4] Above n 1.
[5] *Bolton v Law Society* [1994] [2 ALL ER 486].

history, and his flagrant misleading by omission of the Tribunal on his earlier appearance.

[20] We make the following orders:

(1) An order pursuant to s 242(1)(c) striking the practitioner's name from the role of barristers and solicitors.

(2) There will be an award of costs against the practitioner, notwithstanding his bankruptcy, in the sum of $14,689.73.

(3) There will be an award of $3,320 pursuant to s 257 against the New Zealand Law Society in respect of the Tribunal's costs.

(4) There will be a further order of costs pursuant to s 249 directing that the practitioner reimburse the New Zealand Law Society in full the amount of the Tribunal costs as set out above.

DATED at AUCKLAND this 31st day of July 2013

Judge D F Clarkson
Chair

Appendix 1

In the New Zealand Lawyers and Conveyancers Disciplinary Tribunal

In the matter of the Lawyers and Conveyancers Act 2006

And

In the matter of **Edward Errol Johnston** of Auckland, Solicitor

Amended Charges

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Charge 1

Auckland Standards Committee No. 2 of the New Zealand Law Society (**Standards Committee**) charges **Edward Errol Johnston** of Auckland, 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**"), Lawyers and Conveyancers Act 2006 (Trust Account) Regulations 2008 (**Regulations**) and/or the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**), namely:

(i) Section 4 of the Act (breach of fiduciary duty owed to his clients); and/or

(ii) Regulation 7 of the Regulations (allowing money of a client to be credit or otherwise provided to a company of whom the effective control is vested directly or indirectly in the sole practitioner without the client obtaining legal advice and representation in respect of that loan from an independent lawyer); and/or

(iii) Regulation 7 of the Regulations (allowing money of a client to be lent to a sole practitioner without the client obtaining legal advice and representation in respect of that loan from an independent lawyer); and/or

(iv) Rule 3 of the Rules (duty to act competently and in a timely manner) ; and/or

(v) Rule 3.3 of the Rules (duty to inform of delays); and/or

(vi) Rule 4.2 of the Rules (duty to complete retainer); and/or

(vii) Rule 5.1 of the Rules (duty not to abuse relationship of trust and confidence); and/or

(viii) Rule 5.2 of the Rules (duty to exercise professional judgement within bounds of the law and professional obligations solely for benefit of the client); and/or

(ix) Rule 5.4.2 of the Rules (duty not to act for a client in any transaction in which the lawyer has an interest); and/or

(x) Rule 5.4.3 of the Rules (duty not to enter into any financial, business, or property transaction or relationship with a client if there is a possibility of relationship of trust and confidence being compromised); and/or

(xi) Rule 5.5 of the Rules (duty not to engage in business or professional activity that could reasonably be expected to compromise the discharge of the lawyer's professional obligations); and/or

(xii) Rule 6 of the Rules (duty to protect and promote the interest of the client to the exclusion of the interests of third parties); and/or

(xiii) Rule 6.1 of the Rules (duty not to act for more than one client on a matter where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients); and/or

(xiv) Rule 7 of the Rules (duty to promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client); and/or

(xv) Rule 7.1 of the Rules (duty to take reasonable steps to ensure that a client understands the nature of the retainer and keep the client informed about progress. Duty also to consult the client about steps taken to implement the client's instructions); and/or

(xvi) Section 142(2)(a) of the Act (failure to furnish documentation as required by a Standards Committee).

The facts and matters relied upon and the particulars of the charges are as follows:

Background Facts

1 The Practitioner is a Barrister and Solicitor of the High Court of New Zealand, and is a sole practitioner. At all material times the Practitioner practised as Ed Johnston and Co (**Firm**).

2 At all material times the Practitioner held a practising certificate as a sole practitioner issued under the Lawyers and Conveyancers Act 2006 (**Act**).

3 The Practitioner was a personal friend of D. The Practitioner provided legal advice to the D F T (**Trust**).

4 The Trust is a discretionary trust that was created by D. Prior to D's death, the three trustees of the Trust were D, J and K.

5 D is now deceased, having died on 29 August 2010. Since D's death, the remaining trustees are J and K.

6 In addition to being a trustee of the Trust, J is a beneficiary of the Trust.

7 K is a chartered accountant who, in addition to being a trustee of the Trust, has provided professional accounting services to the Trust.

Practitioner's dealings with the Trust

8 The Practitioner approached J and D in 2009 regarding possible investments for the Trust.

9 On 3 July 2009 the Practitioner arranged for the Trust to invest in the purchase of a mortgage amounting to $330,000.00. The vendor of the mortgage was another client of the Practitioner's. The $330,000.00 was paid to the Practitioner's trust account on 3 July 2009.

10 By acting for multiple clients in a client to client lending transaction, where there was a more than negligible risk that the Practitioner may be unable to discharge his obligations to one or more of his clients, the Practitioner breached Rule 6.1 of the Rules.

11 On or about 2 November 2009, the Practitioner requested and received another advance from the Trust of $150,000.00. There is no record of this advance in the Practitioner's trust account records that the NZLS has.

12 On or about 9 November 2009, $274,000 was paid to the Trust in partial repayment of the $330,000.00 paid in July, together with interest payable of $24,750. The Practitioner's trust account ledger indicates full repayment of the mortgage, including interest of $24,750, occurred on 22 December 2009 (i.e. a payment of $354,750). The trust account ledger reflects payment of $274,000 to the Trust on 22 December 2009.

13 The outstanding balance of the funds due to the Trust of $80,750 (including interest) was held in the Practitioner's trust account.

14 In June 2010, the trustees met with the Practitioner to discuss the use of the $150,000 advance as well as the $80,000 of Trust money held in the Practitioner's trust account, plus a $20,000 procuration fee (totalling $250,000). The Practitioner recommended that the trustees purchase 25% of the shares in the Practitioner's company, Khyber Investments (2009) Ltd (**Khyber 2009**). The Practitioner advised J that this company had been formed with a view to undertaking land purchases, development, and sales.

15 By acting for the Trust in this transaction, the Practitioner placed himself in a position where his duty to the Trust conflicted with his own interests and continued to act despite that fact. The Practitioner did not refer the trustees for independent legal advice or ensure that independent legal advice was obtained in relation to receiving the money for investment in Khyber 2009, in breach of Regulation 7 of the Regulations, and Rules 5, 5.1, 5.2, 5.3, 5.4, 5.4.2, 5.4.3, 5.4.4, 5.5, 5.11, 6, and 6.1 of the Rules.

16 The Practitioner did not provide transfers for the purchase of shares in Khyber 2009 and did not register the transfers.

17 The Practitioner subsequently requested that the Trust make a further investment by way of a loan of an additional $250,000.00 for use as a deposit on a property at 210 Khyber Pass Road. On 23 June 2010 the

Trust paid a further $250,000 by way of a loan to the Practitioner for that purpose.

18 By acting for the Trust in this transaction, the Practitioner placed himself in a position where his duty to the Trust conflicted with his own interests and continued to act despite that fact, acting for his own benefit and otherwise than in the best interests of the Trust. The Practitioner did not refer the trustees for independent legal advice or ensure that independent legal advice was obtained in relation to receiving the money for investment in Khyber 2009, in breach of Regulation 7 of the Regulations, and Rules 5, 5.1, 5.2, 5.3, 5.4, 5.4.2, 5.4.3, 5.4.4, 5.5, 5.11, 6, and 6.1 of the Rules.

19 The $250,000.00 loaned by the Trust was transferred to an account nominated by the Practitioner, namely ASB account number X, on 23 June 2010. The Practitioner did not provide any security for the borrowing.

20 At all times the Practitioner advised the Trustees that both investments were:

(a) Safe and secure;

(b) For the purposes of bridging finance needed by the Practitioner, and that would be easily replaceable; and

(c) That the investments would make a good return over a short period.

21 The three trustees of the Trust requested that the Practitioner fully document the two transactions. Despite that request, no documentation was drafted by the Practitioner, save for share transfers said to have been produced in respect of the First Funds. Share transfers were not received by the trustees. The transfer of shares was not registered with the Companies Office.

22 On 30 June 2010 D emailed the Practitioner requesting paperwork on the loan of the second $250,000.

23 On 1 July 2010 the Practitioner responded “Good idea. I will get some paperwork together”.

24 On 20 July 2010 D sent the Practitioner a further email requesting urgent confirmation of the loan agreement for the $250,000. A further email to the same effect was sent to the Practitioner by D on 29 July 2010.

25 The Practitioner’s failure to provide information to D upon request breached Rule 3, 3.2, 3,3, 7, 7.1 and 7.2 of the Rules.

26 D died on 29 August 2010.

27 On 30 September 2010, J sent an email to the Practitioner requesting an update from the Practitioner regarding the loan of $250,000.

28 On 1 October 2010 the Practitioner responded to J that “the 250k is still tied up. Trying to get the property ‘under control’. We have had a finance offer but not high enough. Still haggling with the vendor and the broker.” The Practitioner’s failure to provide information to J upon request breached Rule 3, 3.2, 3,3, 7, 7.1 and 7.2 of the Rules.

29 The Practitioner did not respond to enquiries in a timely manner, failed to keep the Trust updated on progress on the retainer and failed to inform them of material and/or unexpected delays. Such conduct was in breach of 3, 3,2 and 3,3 of the Rules.

30 The Practitioner did not at any time advise the trustees to seek independent legal advice, prior to the transactions or subsequently, upon becoming aware that the Trust had or may have had a claim against him. He did not at any time inform the trustees that he could no longer act for the Trust. These failures were in breach of Rule 5.11 of the Rules.

31 On 24 February 2011, Steve Barter of Barter and Co Barristers and Solicitors (**Barter and Co**), wrote to the Practitioner enclosing authority to uplift files and seeking:

(a) Full accounting of the affairs of the trusts, including copies of the relevant trust ledgers; and

(b) Urgent repayment of funds made available to the Firm for investment on the Practitioner’s advice.

(c) An explanation of the situation with respect to the second transfer of $250,000.

32 On 10 March 2011, the Firm responded, providing information to Mr Barter:

(a) The Practitioner confirmed that he had received two payments of $250,000;

(b) The first payment of $250,000 was to purchase a 25% shareholding in Khyber Investments (2009) Ltd, and the second payment was “essentially an advance” to Khyber Investments (2010) Ltd “but for which I take full responsibility”;

(c) No paperwork was concluded in respect of the second $250,000;

(d) The Practitioner is involved with both of the entities that are benefitting from the funds;

(e) That independent advice was given by K, “if it can be called independent advice”, in relation to the purchase of the shares, but “there was no legal independent advice otherwise”.

(f) No interest was payable in respect of the first $250,000, as it was not a loan but a purchase of shares). Interest was payable in respect of the second $250,000 but no interest had been paid;

(g) The second $250,000 were guaranteed by the Practitioner and security could be provided by the Practitioner more formally until repayment had been made;

(h) A demand for repayment was recognised but the Practitioner was unable to arrange the repayment at that time.

33 Further correspondence between the Practitioner and Mr Barter took place over the following months.

34 On about 8 July 2011, a payment of $35,000 was made by the Practitioner against the Second Funds.

35 On 22 August 2011 Mr Barter on behalf of the Trust filed proceedings against the Practitioner in the Auckland High Court, seeking repayment of monies advanced, plus interest, plus indemnity costs for breach of contract, breach of fiduciary duty, and negligence. An interlocutory application for summary judgment was also filed.

36 On 4 October 2011, the Practitioner signed a Deed of Acknowledgement of Debt (**Deed**) in relation to the two advances of $250,000 by the Trust.

37 In reliance on the Deed of Acknowledgement of Debt, the summary judgment application was discontinued.

38 The Practitioner failed to honour almost all of the obligations under the Deed, including making payment of the legal aid and accounting costs incurred and the provision of security. The Practitioner also failed to provide full information as to his asset and liability position, or to provide a transfer of the security properly.

39 The Trustees subsequently filed a claim in the District Court seeking payment of the $25,000 plus GST for legal and accounting fees under the Deed.

40 The Practitioner has knowingly failed to account for the monies advanced to him by the Trust.

41 During the course of its investigation into the complaint, the Standards Committee required the Practitioner to furnish documentation in relation to the investigator. The Practitioner knowingly failed to do so.

42 The Standards Committee further relies upon grounds appearing in the affidavits of Stephanie McGregor and Stephen Howard Barter.