REDACTED VERSION

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 31
LCDT 018/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 5** Applicant
AND	**HEVAL HYLAN** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr A Lamont
Mr C Rickit
Mr P Shaw
Mr S Walker

HEARING at Auckland

DATE OF HEARING 1 April 2014

COUNSEL

Mr C Morris for Standards Committee
Mr G Jenkin for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL (ON PENALTY)

Introduction

[1] This is a decision relating to the penalty to be imposed following a finding of misconduct against the practitioner, in a decision of the Tribunal released 31 January 2014.

[2] The Tribunal, which considered the substantive charge, was chaired by Mr D Mackenzie. Unfortunately Mr Mackenzie retired from office on 31 January thus it was necessary for the penalty hearing Tribunal to be chaired by Judge D F Clarkson. We note there was also a change in counsel representing the practitioner at the penalty hearing.

Background

[3] The full background to this matter is set out in the Tribunal's decision of 31 January 2014. In particular the facts supporting the finding of misconduct are summarised at paragraph [3] of the decision as follows:

> "The misconduct charge arose from the allegation made against Mr Hylan that at the time he certificated the (separation) agreement he knew:
>
> (a) The contents of the agreement were false, in that contrary to what the agreement said the parties (Ms S and her husband) were not separated and were jointly caring for their children;
>
> (b) Ms S was being forced to sign the agreement by Mr S; and
>
> (c) The agreement was needed in order to support a Visa application to Immigration New Zealand ("INZ") for a person said to be Mr S's "girlfriend"."

[4] The Tribunal found that the conduct represented:

> "… A significant departure from accepted standards. And such as would, pursuant to s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 ("the Act")

> … would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable."

[5] Furthermore the Tribunal found that the seriousness of the conduct itself was aggravated by the manner in which the charge had been defended. At paragraph [17] the Tribunal recorded that this had included *"… implausible claims and, at best, significant faulty recall …"* and that this did not reflect well on Mr Hylan *"… and compounds the issue of his lack of probity and integrity demonstrated by his conduct in signing the agreement.*"

Submissions for the Standards Committee

[6] The Standards Committee sought an order striking Mr Hylan's name off the Roll of Barristers and Solicitors, the ultimate penalty.

[7] Mr Morris referred to the alternative explanations proffered by Mr Hylan in the course of defending the matter. He referred to the Tribunal's finding that the explanation set out by the practitioner in his first letter to the Standards Committee of the Law Society on 23 January 2013 was in fact the correct version of events rather than subsequent attempts to justify his actions.

[8] We were referred to the decisions in *Fendall*[1] and *Dorbu,*[2] confirming that the predominant purpose of sanctions in disciplinary proceedings relate to protection of the public rather than a punitive response to the practitioner. In *Dorbu* we are reminded that:

> "… 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 the risk of reoffending, and the need to maintain the reputation and standards of the legal professions. It must consider whether a lesser penalty will suffice …"

[9] Counsel referred us to the dicta in *Hart*[3] where the starting point was said to be the seriousness of the conduct concerned. Of itself that could in some cases be determinative because it will *"… demonstrate conclusively that the practitioner is unfit*

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[1] *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825 at [36]
[2] *Dorbu v New Zealand Law Society* [2012] NZAR 481 (HC) Miller, Andrews, Peters JJ
[3] *Hart v Auckland Standards Committee* [2013] NZHC 83 Winkelmann J and Lang J

to continue to practise as a lawyer. Charges involving proven or admitted dishonesty will fall into this category." However the Court went on to say:

> "In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigation process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of wrongdoing. This, coupled with acceptance of responsibility for the misconduct may indicate that a lesser penalty than striking off is sufficient to protect the public in the future."

[10] Mr Morris correctly submitted that:

> "Mr Hylan's obligation, based on his obligation to uphold and maintain the law, was to refuse to participate in giving the document its authenticity."

[11] Furthermore Mr Morris submitted that the practitioner had shown no insight into his conduct or remorse so that the Tribunal could have "*little confidence any rehabilitative type penalty would be appropriate*".

[12] Mr Morris accepted that there was no personal gain motivation in the actions of the practitioner. He also accepted that were the Tribunal to prefer a lesser intervention than strike off that a period of suspension could be considered. The difficulties Mr Morris had with a rehabilitative approach related to his view of the practitioner's insight into his offending. There was also little detail about any mentoring that could be proposed.

[13] However Mr Morris conceded that the practitioner's field of practice was in an area of law requiring strong advocacy for vulnerable clients and that there were a limited number of lawyers working in this area. He accepted that diminishing those legal resources for the public was clearly a factor for the Tribunal to consider. He also accepted the glowing references provided by the practitioner, particularly from one senior counsel.

[14] In distinguishing the decision of *Sorensen*[4] which had been raised in the submissions for the respondent, a decision in which the High Court set aside a strike off order made by the Tribunal in favour of a suspension for two years and a prohibition of practising on his own account. In that matter the practitioner had knowingly facilitated the dishonest use of an estate by its executors. Mr Morris

[4] *Sorensen v NZLS* [2013] NZHC 1630

submitted that could be distinguished on the basis that Mr Sorensen did not have credibility findings against him. We considered that distinction to be somewhat tenuous in that clearly a dishonest use of a document was involved and in that sense could well be considered in a similar factual category as the present matter.

Submissions for the practitioner

[15] Mr Hylan swore an affidavit for the purposes of the penalty hearing which set out his personal background. It is the case that in disciplinary matters, because the sanctions are not punitive in their intent, that personal mitigating circumstances of the practitioner carry less weight.

[16] However it does have to be said that the background of this practitioner is somewhat extraordinary and certainly is a matter which can be taken into account by the Tribunal in assessing overall fitness to practice and any potential risk to the public.

[17] Redacted.

[18] Redacted.

[19] He arrived in New Zealand in 1994 with no money or passport and was accorded refugee status. Shortly after this time he met and married his former wife and they have two children. He was employed as an interpreter while studying to gain his law degree in the late 1990s and early 2000s.

[20] He gained his law degree in 2003 and has since completed post-graduate papers towards an LLM. Unfortunately in 2010 he and his wife separated and there were somewhat acrimonious proceedings relating to the care arrangements for their children. These proceedings occurred during the time that the conduct in question arose.

[21] Mr Hylan has provided medical evidence from his doctor and from his counsel in the Family Court proceedings attesting to the enormous psychological pressure he was under at the time.

[22] The doctor confirms that:

> "… It can't be underestimated how the pressure he has been under may have affected his decision making over the last 18 months or so. To his credit though he now recognises the warning signs and is actively taking steps to balance his domestic and working life and is developing strategies to make sure any mistakes he may have made through this time will not be repeated."

[23] Redacted.

[24] On behalf of Mr Hylan, Mr Jenkin took the Tribunal through a number of decisions where strike off had been rejected by the Tribunal and a suspension considered to be an appropriate penalty in circumstances of quite serious misconduct. We have referred to the decision of *Sorensen,*[5] in addition counsel referred us to *Fendall,*[6] the *Davidson*[7] decision and *Fletcher.*[8]

[25] Having referred to the various periods of suspension imposed on the practitioner's in those matters, counsel sought on behalf of his client a "second chance" in the form of a suspension at the relatively low level of three to six months.

[26] Through his new counsel, Mr Jenkin, Mr Hylan accepted the Tribunal's finding that when the agreement was signed he knew his client did not wish to separate and that he knew her husband was forcing her to sign the agreement in order to support the girlfriend's Visa application. Mr Jenkin conceded "*the practitioner accepts that in that sense the agreement is false and that he should have refused to witness it*." Mr Jenkin pointed out that Mr Hylan had sent the client away once, because he did not wish her to sign under duress, but that she had returned and apparently begged him to witness it. He gave into her demands and recognises that he ought not to have.

[27] Mr Jenkin submitted that this was not "wilful, advertent and calculated dishonesty". He points to the practitioner's letter written on behalf of his client when she returned to him six months later, advising INZ of the true state of affairs. Mr Jenkin points out that if his client was dishonest that he would not have written this letter, setting the matter right. Indeed it was this letter which gave rise to the complaint from the client's husband. There has never been any complaint made by the client herself and we do consider that to be a relevant feature.

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[5] *(Supra) note 4*
[6] *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825
[7] *Otago Standards Committee v Davidson* [2012] NZLCDT 39
[8] *Waikato Bay of Plenty 356 Standards Committee v Fletcher* [2013] NZLCDT 16

[28] Mr Jenkin also points out there was no motivation in the sense of personal reward, the practitioner's objective was to assist the client and to comply with her instructions. He rightly points out that the complainant husband has not suffered as a result of the actions which form the subject of the charge; that the false nature of the agreement was of the complainant's own making.

[29] In addressing the practitioner's conduct of the proceedings, Mr Jenkin points to a certain naivety on behalf of the practitioner. He also pointed to the level of honesty and openness in the practitioner's own letter to the Law Society of January 2013. He points out that it was the practitioner's own concession that the separation agreement was a sham, which led to his being charged with the current offence. He submits that that is not a letter "*written by somebody who is trying to conceal dishonesty. The opposite is true.*"

[30] Mr Jenkin reminds us that this is the first disciplinary offence committed by this practitioner and sets that alongside the references that have been provided to the Tribunal by colleagues and others. It is submitted that these references show the commitment of the practitioner to his clients and his work and the level of respect amongst his colleagues for him. It is submitted he has done significant voluntary and pro bono work and is a valuable member of the community. The references include one from a respected Queens Counsel who had read the decision of the Tribunal. That reference refers to Mr Hylan as:

> "A remarkable individual who is fundamentally motivated by a desire to help those less fortunate than himself. And over the years his deeply held ethical beliefs have translated into practical assistance for numerous "underdogs" in the community. Much of this work has been done on a pro bono or grossly underpaid basis*."*

[31] The reference (from Mr Illingworth QC) goes on to state:

> "It is also my impression that the lapse in professional standards described in the decision of the Tribunal is almost certainly out of character and an aberration as compared with (the practitioner's) normal behaviour."

And he went on to express the view that:

> "… I am sure that, if given a second chance, he will be scrupulously careful in his future professional conduct. In short, I believe (the practitioner) is essentially an honest practitioner who has had a serious lapse on an isolated occasion."

[32] In reliance on that and on numerous other references provided to the Tribunal Mr Jenkin submits that this ought to be regarded as a one-off lapse and that the practitioner is a fit and proper person to remain as a member of the profession.

Decision

[33] On an overall assessment of the offending, and of the practitioner, having regard to all the matters set out above, we did not consider that strike-off, the ultimate penalty, was warranted.

[34] However we are unanimously agreed that the conduct is so serious that it must be reflected in an order suspending the practitioner**.**

Majority decision - Chair, Judge D F Clarkson, members Messrs A Lamont, P Shaw and S Walker

[35] The majority records the following factors in reaching a decision that the practitioner should be suspended for a period of 9 months: While we have serious concerns about the manner in which the practitioner conducted himself in the substantive hearing, which are clearly set out in our earlier decision, we note that the practitioner has instructed fresh counsel and appears to have adopted a more responsible approach at the penalty hearing.

[36] How we should take account of the conduct of the substantive hearing is complicated because it is at odds with the practitioner's initial openness in his first letter to the Law Society of January 2013. The unreliable impression created at the substantive hearing is also completely at odds with the references that have been provided on behalf of the practitioner by colleagues of considerable repute.

[37] In the end we do not consider that the practitioner poses a risk to the public or that any element of dishonesty in the sense of personal gain, or more than a lapse in judgment when pressed by an overwrought client existed. He will need to learn to withstand the pleas of clients in upholding his own and his profession's ethical standards in future.

[38] We take account of the practitioner's fairly minimal financial circumstances in awarding costs against him and in respect of the period of suspension, given that he will be unable to earn income as a lawyer during that period. However we do have to take account that the costs which were incurred by the Standards Committee were considerably inflated by the manner in which the defence was conducted.

[39] Finally we take account of the fact that the practitioner has no previous disciplinary history and has built up somewhat of a 'credit' by his pro-social attitude to client care in the past, in particular pro bono work carried out by him for people who might not otherwise have received legal representation.

Minority decision - member Mr C Rickit

[40] While it is accepted that the conduct of which the practitioner has been found guilty is not such that he can be considered *not a fit and proper person to be a practitioner*, it is nevertheless conduct at the higher end of the seriousness scale. He participated in the facilitation of a scheme to defraud an agency of the New Zealand Government.

[41] The seriousness of the conduct was exacerbated by the practitioner's refusal at the hearing of the misconduct charge to acknowledge the error of his ways. Indeed, as noted in the Tribunal's decision, it was necessary for the Tribunal to remind the practitioner when he was giving his evidence and responding to cross-examination that he was on oath. I accept the submission of Mr. Morris as Counsel for the Standards Committee that the practitioner has demonstrated no insight into his conduct or remorse, notwithstanding that at the penalty hearing his new Counsel adopted a more conciliatory attitude on the practitioner's behalf.

[42] The decision in *Sorensen*[9] is closely aligned, in relevant respect, to the circumstances of the practitioner's offending. That case involved the knowing facilitation of a dishonest scheme, it was a "one off" incident, there was no personal financial gain, and the Tribunal was provided with glowing references on the practitioner's behalf. In short, a very similar situation to the current one. On appeal against the Tribunal's decision to strike off the practitioner, a two years suspension was substituted by Peters J in the High Court. I discern no material features of this

[9] Above, n 4

practitioner's conduct to distinguish it from the conduct in *Sorensen*, and therefore consider a similar suspension period to be the appropriate response from this Tribunal, namely two years.

[43] I have a real concern as to the practitioner's resumption of practice on his own account following a period of suspension. That concern stems largely from his lack of insight into his offending. I believe that the appropriate course for this Tribunal to adopt is to restrain the practitioner from resumption of practice on his own account without reference back to the Tribunal. That will enable the Tribunal to fully assess the practitioner's suitability to provide legal services to the public on an unsupervised basis.

ORDERS

The orders we make are as follows:

1. The practitioner will be suspended for a period of nine months commencing 14 days from the date of this decision.

2. The practitioner is to pay the sum of $24,000 in respect of the costs incurred by the Standards Committee.

3. The s 257 costs are certified at $10,400 and are to be paid by the New Zealand Law Society.

4. The practitioner is to reimburse the New Zealand Law Society all of the s 257 costs.

5. This decision will not be published for 14 days following its release because of the sensitive nature of the personal background of the practitioner which is referred to in the decision. Should the practitioner seek to have any of this material suppressed then he is to make submissions within seven days of the release of the decision, with the Standards Committee having a further seven days to respond.

DATED at AUCKLAND this 13th day of June 2014

Judge D F Clarkson
Chair