**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2011] NZLCDT 31

LCDT 017/11

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **AUCKLAND STANDARDS COMMITTEE 5 OF THE NEW ZEALAND LAW SOCIETY**<br>Applicant |
| **AND** | **JOHN ROBIN HOLMES**<br>Respondent |

**CHAIR**

Judge D F Clarkson

**MEMBERS OF TRIBUNAL**

Mr W Chapman

Mr J Clarke

Ms C Rowe

Mr I Williams

**HEARING** at AUCKLAND on 26 October 2011

**APPEARANCES**

Mr P Collins and Mr M Treleaven for the Applicant

Mr C Pidgeon QC for the Respondent

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

[1] John Robin Holmes ("the practitioner") was charged by the Auckland Standards Committee 5 of the New Zealand Law Society ("NZLS") on 11 August 2011 pursuant to section 241 of the Lawyers and Converyancers Act 2006 ("the Act") with:

a) Misconduct, or in the alternative

b) Unsatisfactory conduct that is not so gross wilful or reckless as to amount to misconduct

in that on or about 8 June 2010 he deducted as fees, on the basis of pro forma invoices which were not notified to the clients and which did not reflect any services provided, money he held in the nature of stale balances for a number of persons. The charge is that this conduct breached all or any of sections 110(1) (b) and 111(1) of the Lawyers and Conveyancers Act and Regulation 9 of the Lawyers and Converyancers Act (Trust Account) Regulations 2008 ("the regulations").

[2] The practitioner admits the charge of unsatisfactory conduct but denies that the facts established that he is guilty of a charge of misconduct.

***Background***

[3] The practitioner is an experienced barrister and solicitor and is the sole director of the incorporated law firm Holmes Dangen & Associates Limited, at Auckland. He has been a principal of a firm, in one form or another, for about 35 years. He has been in sole practice since January 1995, and acquired another practice in January 2006, of which he is principal to this day. The principal of that firm remains a Consultant to the exisiting practice. Mr Holmes practises predominantly in commercial and property matters. He has had the responsibilities of trust account partner or trust account supervisor since the advent of the Financial Assurance Scheme in 1998.

[4] Mr Holmes is 65 years of age and is married with five adult children. He has served the legal profession in various roles through the Auckland District Law Society and the New Zealand Law Society, including as a costs assessor and as a member of panels which consider applications to practice as a principal. Mr Holmes has not previously been the subject of disciplinary proceedings by the Auckland District Law Society or the New Zealand Law Society.

[5] In August 2010 an Inspector of the NZLS reviewed the trust account of Mr Holmes' firm. Investigations concluded that Mr Holmes had earlier deducted trust money, purportedly as fees, in the total sum of approximately $1,700.00 from dormant balances in his firm's trust account. The mechanism for the fee deductions involved the creation of seven false pro forma invoices purporting additional attendances by the practitioner and others in the firm. Copies of these invoices were not at the time they were rendered sent to the clients, and authorities were not sought from affected clients to deduct the fees from monies being held on account by the practitioner's firm.

[6] Without detailing the specifics of the particular files which resulted in the charges, the situation that gave rise to the charges related to relatively small balances (the largest being $337.50) which had been sitting in the firm's trust account ledger over many years, and client contact had been lost. Some of the clients in question had been inherited when Mr Holmes acquired the practice in 2006, and some were not personal clients of the practitioner.

[7] It appears that on a particular day or consecutive days Mr Holmes decided to remove these stale balances which had been dormant in the firm's trust account for up to eight years, because he knew there was a regulatory requirement not to hold funds indefinitely. Some of the files the subject of the charges related to companies which had gone into liquidation, or for various other reasons were not readily contactable. In any event Mr Holmes believed at the time that the fees charged during this "clean-up" were justifiable, and he has not resiled from that belief since, including at the hearing. However, in admitting the lesser charge of unsatisfactory conduct the practitioner accepted that the treatment of the stale balances was not in accordance with the regulations and the Lawyers Trust Accounting Guidelines.

[8] Mr Holmes cooperated fully with officers conducting the investigation; took appropriate advice from colleagues when informed of the outcome of the investigation; and took steps in October 2010 to remedy the situation. He cancelled five of the seven bills and after what he described as considerable efforts to locate them, paid out balances to two clients and to the unclaimed monies fund in the Inland Revenue Department. The practitioner also took action within his practice to prevent a recurrence of matters identified by the investigation.

***Misconduct or Unsatisfactory Conduct***

[9] NZLS contends that the conduct of the practitioner rises to the level of misconduct rather than unsatisfactory conduct because the practitioner has admitted he had no authority from the clients to deduct fees; the pro froma invoices did not reflect any services provided to the clients for which the respondent could properly have charged fees; and the fee deductions constituted non-compliance with the provisions of the Act and the Regulations. NZLS says this is the unauthorised and non-compliant taking of client money, and that that represents misconduct by any established definition of the term. Mr Collins for the NZLS submitted that the facts of the case were undisputed, and that the only matters to be addressed were the application of those facts to the principles of establishing misconduct in the legal profession; and an appropriate penalty. NZLS accepted, nevertheless, that the practitioner had a previously unblemished disciplinary record during 40 years of practice.

[10] Under cross-examination Mr Holmes agreed that, given his long experience as a practitioner he was not ignorant of the law, and in particular the rules and regulations about management of trust accounts. He accepted that he had acted outside those regulations. He accepted that he could not justify the attendances which had been charged on some of the pro forma invoices; but noted that pro forma invoices had been raised only in respect of funds held for clients he believed the firm could not locate or companies whose liquidations had been completed.

[11] Mr Holmes said he believed even on reflection that, in relation to some of the stale balances, he was entitled to take fees for costs on the timesheet which

had not previously been billed, or having been previously written down, in order to recover the cost of the time expended. Mr Collins for the NZLS submitted that this plea "aggravates rather than mitigates his position".

[12] Mr Pidgeon QC, for the practitioner, suggested that a practitioner might be forgiven for thinking that the cost of locating the clients and returning the money or paying to the Inland Revenue Department, might be seen to negate the effort involved particularly when the largest sum retained being $337.50.

[13] Mr Holmes admitted that he had not been as assiduous as he could have been about clarifying the status of the liquidations of some of the companies the subject of the files in question, and that monies owed to those companies in liquidation should have been sent earlier to the liquidator rather than retained in his trust account. The evidence also showed that one of the clients (D) had paid twice, apparently in error, for the same matter. Another client had overpaid his earlier fees account.

[14] Mr Holmes confirmed that none of the clients in question had been notified of the outstanding balances in the firm's trust account. This contradicted the argument made in oral submissions by Mr Pidgeon, for the practitioner, that Mr Holmes' actions did not mislead his clients, who had not complained, and that there had been no adverse impact on them. In the Tribunal's view, it is axiomatic that if the clients did not know about the balances they had no opportunity to consider their positions. In relation to one of these clients, (Mr L and Ms S) the evidence established that a letter which had been written to them in July 2007 about an outstanding balance was annotated "not sent".

[15] In response to a question from the Tribunal, Mr Pidgeon said in his opinion the offending in this matter was less serious than that of W in the recent High Court case[1] which related to breach of an undertaking. In that case the NZLS had successfully appealed a decision of the Tribunal which had determined that the conduct had not reached the threshold of misconduct. The High Court found W was guilty of negligence or incompetence in his professional capacity that has been of such degree as to tend to bring the profession into disrepute.

[1] *Auckland Standards Committee 3 of NZ Law Society v W* HC AK CIV-2010-404-005509 [11 July 2011]

[16] **Misconduct** is defined in s7 of the Act as follows:

> (1) In this Act, misconduct, in relation to a lawyer or an incorporated firm,-
>
> (a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct-
>
> [i] that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
>
> [ii] that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services.
>
> ...

[17] In relation to trust accounts, sections 110(1)(b) and 111(1) of the Act are relevant and read:

> **110 Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person –
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of –
>
> [i] the practitioner; or
>
> [ii] a person who, or body that, is, in relation to the practitioner, a related person or entity; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.
>
> **111 Obligation to account for trust money and valuable property**
>
> (1) If, in the course of the practice of the practitioner or an incorporated firm, the practitioner, a related person or entity, or the incorporated firm receives or holds money or other valuable property on behalf of any person, the practitioner, related person or entity, or incorporated firm must account properly for the money or other valuable property to the person on whose behalf the money or other valuable property is held.

[18] Regulations 9(1) and (2) of the Lawyers and Conbeyancers Act (Trust Account) Regulations 2008 read:

> **9 Restriction on debiting trust accounts with fees**
>
> (1) No trust account may be debited with any fees of a practice(except commission properly chargeable on the collection of money and disbursements) unless–
>
> (a) a dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and particular purpose to which it is to be applied has been obtained and is available for inspection by the Inspectorate.
>
> (2) If fees are debited under subclause (1) (a) an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.
>
> (3) For the purposes of subclause (2), a practitioner or partner in the practice is not to be treated as having a legal or beneficial interest in the trust account to be debited, solely because the pracctitioner or partner issues the invoice in respect of that trust account.

[19] The Tribunal has considered the relevant authorities in relation to misconduct, including those relied on by Mr Collins and Mr Pidgeon. These authorities discuss the range of conduct which can amount to misconduct, from "*actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner*."[2]

[20] The meaning of misconduct traversed in *Pillai*[3] encompasses *"fault beyond the error of judgment; a wrongful intention, and not a mere error of judgement; but it does not necessarily imply corruption or criminal intention, and, in a legal idea of misconduct, an evil intention is not a necessary ingredient. The word is sufficiently comprehensive to include misfeance as well as malfeasance, and as*

[2] *Complaints Committee No 1 Auckland District Law Society v APC* [2008]3 NZLR 105 at [27]
[3] *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 (Kirby P), and cited in Re A (Barrister and Solicitor of Auckland) [2002] NZAR 452

*applied to professional people it includes unprofessional acts even though such acts are not inherently wrongful."*

[21] *Bolton*[4] speaks of the requirement that a lawyer in the performance of his or her professional duties must show "*complete integrity, probity and trustworthiness".*

[22] Like the NZLS, the Tribunal accepts that Mr Holmes is an honest and dilgent man and that he is held in high regard by his colleagues in the legal profession. By way of confirmation of his standing, we received as evidence affidavits from Mr Brian Keene QC, and Nola Dangen, Consultant to the practitioner's firm. Both attested to his character and integrity. We have already mentioned Mr Holmes' unblemished record in 40 years of practice. We tend to agree with Mr Pidgeon that the "clean-up" actions which Mr Holmes engaged in relating to the firm's Trust Account were more "laziness than badness".

[23] Notwithstanding these factors, we cannot ignore the fact that this conduct was concerned with the taking of client money; there was no authority from clients to deduct fees; and the mechanism for the fee deductions involved the creation of false and misleading documents in the form of invoices purporting further attendances justifying the fees. This is in breach of the Act and the regulations. It struck us that this was all the more worrying given the practitioner's experience as a lawyer and a trust account administrator; and the fact that Mr Holmes continued to justify his actions in relation to recovering fees not charged earlier, while also acknowledging his errors.

[24] We regard the conduct as a reckless contravention of the Act and regulations, or misconduct as defined in s 7(1)(a)(ii) of the Act, albeit at the lower end of the scale of misconduct offences. Mr Pidgeon characterised his client's actions as the "cleaning-up of small balances and as the taking of a 'short-cut'". Though we accept this description of his motivation, it did not amount to an excuse. The Tribunal infers that Mr Holmes simply did not turn his mind to his obligations and was therefore reckless. Given the comparatively

[4] *Bolton v Law Society* [1994] 2 All ER 486, 491-492

small amounts of money involved, and the associated administrative costs, the exercise Mr Holmes engaged is unlikely to have generated any significant net benefit to the firm. We accept that the practitioner had no dishonest intentions, but that is not necessarily the way a client (if they had been informed) or member of the public might view the conduct. The regulations as to the handling of client money exist for a very good purpose. Lawyers hold a position of privilege and trust in handling the funds of their clients, thus there must be strict observance with the conditions on which they do so, in order to maintain the confidence of the public in the profession as a whole.

[25] If a lesson is required, then it is that this offending affords the opportunity to offer the legal profession a timely reminder. In the event any credit balance is held for a client, whether small or large, there must be an accounting to the client. Of course, a fee can be drawn, but only in the event that it is properly due in terms of the retainer first established. The account (and fee note, if any) must be delivered to the client. If the client cannot be located then the statutory requirement for payment to the Crown must be followed.

***Penalty***

[26] The NZLS has sought a fine of $5,000.00, and a censure. We agree that $5,000.00 is the correct level for this offending. It was indicated that the practitioner was able to afford a fine (and Costs order).

[27] A censure is inevitable where misconduct is established and suspension or striking off are not imposed.

***Suppression***

[28] The presumption in favour of publicity and openness has been previously referred to in decisions of this Tribunal.[5] Section 238 of the Act provides that hearings are to be in public. Section 240 of the Act provides that the Tribunal may make an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person, including the privacy of the complainant and to the public interest.

[5] *Standards Committee No.1 v. B. Hart* (unreported) NZLCDT 5/11

[29] Mr Pidgeon has sought suppression of the details of the practitioner and his firm because of Mr Holmes' unblemished record in 40 years of practice, his service to the legal profession, and the possibility that publication in the Gazette could give a totally misleading picture of the practitioner's conduct. The NZLS considered there were no grounds for departing from the presumption of open justice inherent in section 238 of the Act. NZLS did seek a restriction on publication of identity of the practitioner's clients.

[30] In coming to our decision on this matter we have weighed the presumption of openness against the possibility that publication in this case may be disproportionate when comparing the potential harm it might otherwise cause his good reputation as compared to the scale of offending. This is of particular concern when considering the practitioner's previously unblemished record, and stage of practice. In the circumstances, the Tribunal has also weighed on the scale the need for the public to have access to information that is presented to them fairly and accurately in order that confidence in the provision of legal services is maintained. We consider in this case the public interest outweighs any potential harm that may result.[6]

[31] On balance we have decided that there should be no suppression of the practitioner's name, but that identifying characteristics of the practitioner's clients should be suppressed. However, we propose to grant an interim order as to the practitioner's name for a limited period, in order for him to take any further steps he may wish to take.

**Orders**

1. Mr Holmes is formally censured.
2. A fine of $5,000 is imposed.
3. Costs of $6,805 in favour of the Standards Committee are awarded against Mr Homes.
4. Cost of the Tribunal of $3,000 are awarded pursuant to s 257 against the New Zealand Law Society.

[6] *Hawkes Bay Standards Committee v. Hill* [2010] NZLCDT 28

5. Mr Holmes is ordered to reimburse the New Zealand Law Society for the s 257 costs of $3,000, pursuant to s 249

6. Suppression orders are made as follows:

   (i) In relation to the names of any clients referred to in the proceedings;

   (ii) There will be in interim suppression order as to the name of the Practitioner which will lapse after a period of 10 days.

**DATED** at AUCKLAND this 16th day of November 2011

Judge D F Clarkson
Chairperson