NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 35

LCDT 019/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 3** Applicant
AND	**BRUCE NELSON DAVIDSON** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms S Hughes QC

Ms C Rowe

Mr W Smith

HEARING at Auckland on 15 November 2012

APPEARANCES

Mr P Davey and Mr M Treleaven for the Standards Committee

Mr C Carruthers QC and Mr D Hurd for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This case has proved to be one of the most difficult thus far faced by this Tribunal. The difficulty arises, not from the complexity of the factual matrix, that is the collapse of the Bridgecorp Group of companies; the Tribunal is well used to complex facts. Nor does the difficulty only arise from the tragedy of the situation, both for all of those investors who suffered from the collapse of the companies or to the practitioner in facing these charges at the end of a distinguished career. The difficulty arises most acutely when the Tribunal has to assess the viewpoint of a reasonable person, informed of the surrounding circumstances. It transpires that the reasonable perspective in question, which will be discussed in this decision, is not a universal one among Tribunal members.

Charge

[2] The charge faced by Mr Davidson, and laid pursuant to s 241(d) of the Lawyers and Conveyancers Act 2006 ("LCA") reads as follows:

> "**Auckland Standards Committee 3 of the New Zealand Law Society** charges that **Bruce Nelson Davidson** has been convicted of an offence punishable by imprisonment and the conviction reflects on his fitness to practise or tends to bring his profession into disrepute.
>
> **Particulars**
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> On or about 2 September 2011 Mr Davidson was convicted of six offences under s 58(3) of the Securities Act 1978 that between 21 December 2006 and 6 July 2007 he signed or had signed on his behalf registered prospectuses for Bridgecorp Limited and Bridgecorp Investments Limited that were distributed and included untrue statements as detailed in the indictment and summary of facts in respect of those offences.
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> On or about 2 September 2011 Mr Davidson was convicted of four offences under s 58(3) of the Securities Act 1978 that between 21 December 2006 and 6 July 2007 he was a director of Bridgecorp Limited and Bridgcecorp Investments Limited that distributed advertisements which included untrue statements as detailed on the indictment and summary of facts in respect of those offences."

[3] Mr Davidson denies the charge. He says that, while the convictions were entered, and acknowledged to be punishable by imprisonment, they do not reflect on his fitness to practise. He further denies that the convictions tend to bring his profession into disrepute.

Background

[4] The broad background surrounding the collapse of these companies is well known. The specific findings and verdicts concerning those Directors who defended the charges brought against them by the Crown (and which form the basis for a detailed chronology provided to us by Mr Davey on behalf of the Standards Committee), were the subject of a lengthy and comprehensive decision giving the verdict in that case by His Honour Venning J.[1]

[5] In the course of the hearing before us Mr Davidson was cross examined on various aspects of his role within the three companies. Mr Davidson became a Director and Chairman of Bridgecorp Holdings in 1988, of Bridgecorp Limited on its formation in 2001, and of Bridgecorp Investments Limited on its incorporation in 2003.

[6] Mr Davidson, the only lawyer on the Board, was charged with offences under the Securities Act and was one of only two Directors to enter guilty pleas prior to trial. He had initially intended to defend the charges of untrue statements on the basis that at all relevant times he believed them to be true. Following the depositions and discovery stages, and after earnest and lengthy discussions with his legal advisers, Mr Davidson accepted that he was unlikely to be able to establish that his belief, though honest, was one which could be said to have been reasonably held. Following a full sentence indication process during which Mr Davidson provided evidence and submissions, he entered guilty pleas to each charge on the basis of a Statement of Facts which acknowledged that his offending **did not involve dishonesty or intentional wrongdoing**. Thereafter, he was sentenced by Her Honour Andrews J to nine months home detention, 200 hours community work, and reparation of $500,000, which was paid immediately.

[1] *R v Petricevic & Ors* [2012] NZHC 665, 5 April 2012, Venning J.

[7] We have been provided with a copy of Her Honour's decision on sentencing. We have also been provided with a lengthy decision of His Honour Miller J which related to the Registrar of Companies having prohibited Mr Davidson from being a Director or Manager of a company for two-and-a-half years. That decision provided useful background information, however we remind ourselves that it dealt with different subject matter from the charge under consideration by the Tribunal and the appeal was argued on the papers without *viva voce* evidence being heard from Mr Davidson.

[8] Mr Davidson's position has been throughout that it was his honest and genuine belief that the statements made in the prospectus documents and extension certificates were true, based on representations that had been made to him by Executive Directors for the company, but that he had been lied to and misled by those Directors as to the real situation. That view has been borne out by the decision of Venning J and indeed, has been accepted by both the sentencing Judge and by Miller J and indeed, is accepted by the Standards Committee in this matter. It is this general acceptance that Mr Davidson's behaviour did not involve dishonesty or intentional wrongdoing which makes the tasks before this Tribunal more complicated.

Two limbs of the charge

[9] The charge is that the conviction either reflects on Mr Davidson's fitness to practise or tends to bring the profession into disrepute (or both). The Tribunal is unanimous that the conviction does not reflect on Mr Davidson's fitness to practise. It was accepted that he was a competent lawyer about whom no complaint had ever been made. To the contrary his integrity as a person and a legal practitioner was unquestioned. Certainly the references provided to support Mr Davidson from a number of eminent New Zealand citizens endorsed his integrity and high level of competence. Furthermore the Standards Committee accepted that the public did not require direct protection from Mr Davidson. In this respect we consider his conduct as a Director can be viewed separately from his conduct as a lawyer.

[10] However, it is in respect of the second limb that is, in relation to the profession's reputation the Tribunal is divided. A majority of three say that this has been established, a minority of two say that it has not.

[11] It does not need to be shown that the conviction has actually brought the profession into disrepute. It is sufficient to show that it tends to do so where the tendency is to be measured against what would be thought by a reasonable person who is fully informed of all of the relevant issues surrounding the conviction and the charge itself. The notional reasonable person may be a non lawyer or may be a lawyer or have a close connection with the profession. Lawyers and non lawyers may react differently when analysing the tendency, there is likely to be a wide spectrum of views in both groups. The Tribunal needs to infer from all the circumstances known to it, what is likely to be thought by a notional reasonable person regardless of connection with or disconnection from the profession.

[12] The offences under the Securities Act are strict liability offences thus no element of intention to mislead need be established. Counsel for the Standards Committee, Mr Davey, provided us with dicta from a number of decisions under the Act to support the submission that the offending at issue was serious and involved a breach of trust. It has to be accepted that the sentencing starting point of three years three months imprisonment fixed upon by Her Honour, qualifies this as serious offending (the maximum penalty for each charge was 5 years imprisonment, or a fine of $300,000). Certainly those victims of the companies' collapse would view it as serious, intentional or not. In his submissions Mr Carruthers points to the fact that under the new legislation proposed (see Financial Markets Conduct Bill 2011) unintentional misleading contact will not be punishable by imprisonment. We are however, bound by the current legislation and the fact that this was faced by Mr Davidson even though his honest and genuine belief was misplaced and ultimately unreasonable.

[13] Both counsel referred us to the *R v Moses*[2] decision where Heath J had this to say in the course of sentencing under the same section of the Securities Act:

> "To the investor, it is all important to know what sort of people will have the control of the money and how that money is to be applied. While some submissions have suggested that breach of trust is not an important issue, the fact remains that investors who provide money in this way trust the directors to act in their best interests and, in the way you acted, you breached that trust."

[2] *R v Moses* CRI-2009-004-1388, 2 September 2011, at [20].

[14] Mr Carruthers referred us to earlier remarks of the Judge at [15] where, in the same decision, His Honour referred to the different levels of offending possible under s 58. His Honour accepted that s 58:

> "... contemplates a spectrum of offending that must carefully be analysed to determine its level of seriousness and the degree of culpability that each offender bears. At the most serious end would be offending involving dishonesty, for example, an intention to mislead potential investors in order to secure funds for a particular venture or to obtain a personal financial gain. Immediately below that would be conduct that could be characterised as either reckless or grossly negligent. By gross negligence, I refer to conduct that involves a major departure from the standard of care expected when a director performs a statutory duty. Below that are cases involving innocent misrepresentation arising out of greater or lesser degrees of carelessness. For example, there may have been an error of judgment in respect of a particular issue that ended up being material to an investment risk."

[15] Mr Carruthers urged upon the Tribunal that it was into this third category of offending under s 58 that Mr Davidson fell. By contrast the Standards Committee submitted that the intermediate level involving recklessness or gross negligence was closer to the actual situation in this case.

[16] The majority of this Tribunal categorises the offending as being squarely within Heath J's second level being "*a major departure from the standard of care expected when a director performs a statutory duty*". The minority sees the offending as closer to Heath J's third level being *"... an innocent misrepresentation arising out of greater or lesser degrees of carelessness*". The minority sees the behaviour as at the very top of that third category and perhaps straying into the lower end of the second category.

[17] In order to discuss this issue further it is necessary to recount some of the detail of the processes which led to the untrue statements being made.

[18] Mr Davidson's evidence was that, as Chairman, he had instituted a number of policies which ought to have ensured that the proper and safe commercial lending practices claimed by the company were adhered to. In particular, before issuing a prospectus the process was that the in-house solicitor would draft the document and would take external legal advice. That advice was supplemented by liaison with the regulatory authorities, the trustee and the external auditors. Before the prospectus or investment statement was submitted to the Board for approval, representation letters were obtained from each of the Managers of the Executive Team responsible for the

particular area of work confirming that there was nothing in the statements which was untrue or misleading. Mr Davidson has described how he had sought to ensure all Board material was circulated well in advance of meetings so that information was able to be studied and considered well in advance of the meeting rather than on a short notice basis. However he confirmed that Mr Petricevic as Managing Director, "seldom provided written reports". Rather he presented oral reports to the Board. Mr Davidson expressed his regret that he was not more insistent that Mr Petricevic adhere to the policy which had been put in place.

[19] Mr Davidson confirmed that at each meeting he specifically inquired of every Director and Senior Executive present whether they had knowledge of any matter which the Board should be aware. It is Mr Davidson's view that he ought to have been able to rely on the honesty of his Senior Executives in providing this information to him. The reporting policies themselves were relatively robust, and had been relied on by the Board in the past without problems. However policies alone will not do.

[20] In cross examination Mr Davidson himself accepted that he ought to have been "*more forensic*". Certainly the Tribunal considers that he ought to have been on his guard about the reports that were presented to him, particularly by Mr Petricevic, from around September 2004 when Mr Petricevic attempted to misuse company funds to purchase an expensive boat. This incident is referred to in the judgment of Miller J.[3] This was referred to by His Honour as *"... unmistakeable evidence of Mr Petricevic's dishonesty, his sense of entitlement to group funds, and his unwillingness to accept the Board's authority"*.

[21] Again in mid-2006 the Barcroft transactions, occurring as they did on the eve of the balance date at 30 June, while apparently satisfactorily explained to Mr Davidson ought to have caused him to investigate further, given the haste with which they were approved by the Board and on the basis of oral representations only. Following the difficulties with the Australian Securities Authorities that year one would have expected a fair degree of sensitivity about these matters.

[3] *Davidson v Registrar of Companies* Wellington High Court, CIV-2010-485-76, 27 August 2010, Miller J at [116].

[22] Certainly by the April 2007 Board meeting when the cash flow figures for February and March were tabled, loud warning bells ought to have been heard. While as Chairman, Mr Davidson sought and was given assurances in terms of his "robust" regime of reporting processes, hindsight indicates that relying on those assurances was naive.

[23] Throughout the evidence, including the decision of Miller J[4] and in references provided for the sentencing indication, as well as to this Tribunal, an explanation for such naivety seems to be found. For example, from Sir James Wallace: "*His main fault seems to be as a good man he had a misplaced trust in others*" and from Mr E Allan "*While a realist, he remained ever supportive and hopeful in his relationships with those he has sought to serve*", and from Ms M Malcolm "*I regard Bruce's difficulties as a real tragedy brought about by his willingness to promote the good in people and to trust that his fellow man and woman would display the same integrity that he espoused*". Miller J records that it was submitted to him that:

> "... In his own representations, Mr Davidson had stated that he is a man of faith and integrity and he had trusted, sometimes to the point of naivety, that others shared similar values."

[24] His Honour commented as follows:[5]

> "I accept that the public has nothing to fear from Mr Davidson. He has learned a painful lesson and I expect that his trusting nature will not again betray him in a commercial setting ..."

[25] At the April 2007 Board meeting Mr Davidson was about to depart for a six-week family holiday overseas. Seeing the state of the cash flow he was most concerned and offered to relinquish this leave and remain at the helm. He was reassured by all of the Board members that he must continue with his plans and therefore was absent from New Zealand as the position deteriorated. When he returned from overseas the true nature of the situation quickly became apparent. As would be expected from a man of his character, Mr Davidson acted promptly and with honour.

[26] We consider he also acted with honour in entering a guilty plea at a time, which was accepted as early. It would seem proper that if the conviction itself is to be

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[4] *Davidson v Registrar of Companies*, above n 3, at [135].
[5] Ibid, at [136].

measured against his membership of the legal profession, then so must his actions in attempting to mitigate the damage insofar as that was possible by co-operating with the authorities and paying a significant sum of reparation ($500,000). He was available to give evidence for the Crown in respect of the prosecutions of the other Directors but in the event was not called upon.

[27] It is the view of the majority that falling so far short of his obligations as a Director and Chairman of the Board and as such, leader of the organisation, and because such a great deal of money was lost to so many investors, is behaviour which tends to bring the profession into disrepute.

[28] On the other hand the minority considers that, where even the sentencing Judge notes that the lawyer concerned acted throughout with honesty and integrity, we question how the conviction entered against such a background can bring the profession as a whole into disrepute. Further, as referred to above, even Miller J in holding that Mr Davidson should have resigned (rather than remained in December 2006 when he considered resignation) said that he "*acted from honourable motives*".

[29] We turn to consider whether a review of the relevant authorities can assist us further.

The legal authorities

[30] Mr Davey on behalf of the Standards Committee referred us to a line of authorities beginning, unsurprisingly with *Bolton v Law Society*[6] in addition to the quote which refers to the profession's collective reputation "*as its most valuable asset*"[7] Mr Davey also cited the decision as follows:

> "The need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness."[8]

[31] Mr Davey properly conceded that convictions arising out of professional misconduct will have a "*much more direct bearing on a person's fitness to practise*" than those arising out of personal misconduct.

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[6] *Bolton v Law Society* [1994] 2 All ER 486.
[7] Ibid, at 491.
[8] Ibid.

[32] Further decisions referred to us included *Complaints Committee of the Canterbury District Law Society v W,*[9] and *Re A Practitioner*[10]. These cases involved some moral reprehensibility on the part of the practitioner, which would seem to be distinguishable from the present case.

[33] Both counsel referred us to the comments of the High Court of Australia in *Ziems v The Prothonotary of the Supreme Court of New South Wales*.[11] In this matter a practitioner had been sentenced to a period of imprisonment following a conviction for manslaughter arising out of a motor accident, where alcohol was involved. The decision focused on whether the Supreme Court was correct to have struck the practitioner from the roll of Barristers and Solicitors, as a consequence of this conviction. Although penalty was the ultimate issue in that matter it does have a number of relevant passages for the purposes of considering the issues of likely impact on the reputation of the legal profession in this matter. Thus Fullagar J had this to say:[12]

> "... It is said that: "The personal and the professional sides of his life cannot be dissociated". If this is read literally, it goes, in my opinion, much too far. Personal misconduct, as distinct from professional misconduct, may no doubt be a ground for disbarring, because it may show that the person guilty of it is not a fit and proper person to practise as a barrister ... But the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former."

[34] Later in the decision Kitto J discusses the distinctness of the legal profession:[13]

> "... the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretentions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community ...
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> Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences,

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[9] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514.
[10] *Re A Practitioner (*1997) 95A Crim R 467.
[11] *Ziems v The Prothonotary of the Supreme Court of New South Wales* [1957] 97 CLR 279.
[12] Ibid, at 290.
[13] Ibid, at 298.

> instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."

[35] His Honour then refers to the seriousness of the conviction but that it was one relating to an isolated event and has this to say:[14]

> "... It is not a conviction of a premeditated crime. It does not indicate a tendency to vice or violence, or any lack of probity. It has neither connexion with nor significance for any professional function. Such a conviction is not inconsistent with the previous possession of a deservedly high reputation, and, if the assumption be made that hitherto the barrister in question has been acceptable in the profession and of a character and conduct satisfying its requirements, I cannot think that, when he has undergone the punishment imposed upon him for the one deplorable lapse of which he has been found guilty, any real difficulty will be felt, by his fellow barristers or by judges, in meeting with him and co-operating with him in the life and work of the Bar. The assumption on which this is based may, of course, be false in a particular case. **But that it must be made in the present case is surely undeniable, since no one has come forward to say a word against the appellant, and he has been called upon to answer nothing but the fact of his conviction**."

[36] The last sentence of this quote has been highlighted because it parallels the present case where no complaint has been made about Mr Davidson by either a member of the public, an investor in Bridgecorp or a client of the practitioner. However that cannot be determinative of the matter as the legislation allows for "own motion" proceedings to come before this Tribunal. It is accepted by the Tribunal that Mr Davidson has justifiably enjoyed a reputation of probity and contribution to the community. It is indeed tragic that this reputation is tarnished by the convictions entered against him. By pleading guilty as he did Mr Davidson further demonstrated his integrity by being prepared to admit to wrong doing but he also acknowledged that in relation to those charges that his conduct was not reasonable.

[37] In the *Ziems* decision we have found support for our unanimous view that the conviction of itself does not reflect on the fitness of the practitioner to continue to practice

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[14] *Ziems v The Prothonotary of the Supreme Court of New South Wales*, above n 11, at 299.

[38] The Standards Committee relied on the decision *Re: A Practitioner*[15] to support the suggestion that the practitioner's conduct as a Director of a company could not be isolated from his status as a Solicitor. We note that situation is distinguishable from the present case, in that the practitioner involved in that matter made improper use of his position as a Chairman for personal gain. That is not the situation here.

Reputation

[39] In an affidavit in reply the Standards Committee has annexed a number of media reports about the Bridgecorp collapse, which include Mr Davidson's name. Some of these refer to him as a lawyer.

[40] It is our unanimous view that media reports do not equate with the test of the view of the reasonable person fully informed of the background of the offending, and we have given these little weight.

Majority Decision as to Second Limb - Reputation of the Profession

[41] We have referred earlier in this decision to the fact that no complaint has been made about Mr Davidson and that there is no evidence that either clients or colleagues see his offending as being likely to reflect on the reputation of the profession as a whole.

[42] However we have taken into account that making a complaint about Mr Davidson might not be a course of action which members of the public would consider even if they viewed Mr Davidson's actions as reprehensible. A majority of the Tribunal believe that members of the public expect the profession to take whatever action is necessary to monitor and maintain the professional standards of its members. This would tend to reduce the significance for members of the public of there not having been a complaint made about Mr Davidson.

[43] The Prospectuses and Investment Statements for the Bridgecorp group of companies referred to the fact that Mr Davidson was a consultant for a national firm of solicitors and was also a former Councillor and past President of the Auckland District Law Society and a former Councillor and Vice-President of the New Zealand

[15] *Re A Practitioner,* above n 10.

Law Society. Mr Davidson was sold to readers of the Prospectuses as an experienced commercial lawyer with a distinguished career. The clear implication of the biographical details was that the Chairman of Bridgecorp was a man investors could trust, someone on whom they could rely.

[44] A majority of the Tribunal say that a reasonable person fully informed of the background of the offending would draw a link between the fact that the leader of the Boards of these failed companies was an experienced commercial lawyer, and that this must tend to reflect on the reputation of the profession as a whole. We observed that Mr Davidson himself said: *"... My professional and commercial reputation has been greatly diminished, if not entirely destroyed."*[16] These words would tend to suggest his reputation as a lawyer was included in that self-assessment.

[45] The practitioner was misled by others, but this does not excuse his conduct. With his experience in commercial matters, he ought to have known what questions to ask, when to ask them, what to do when they were not answered to his satisfaction, and what strategies to adopt to deal, for example, with the Chief Executive with whom he had worked for a long period, and whom he knew had misled the Board long before matters came to a head in mid-2007. The majority believes Mr Davidson's conduct involved a major departure from the standard of care expected when a director performs a statutory duty. The public would expect a senior practitioner to have done better, and this failure must lower the reputation of the profession as a whole.

Minority Decision on Reputation of the Profession

[46] If the reputation of the profession as a whole can be damaged by the conviction of a lawyer on the basis of his naivety or overly trusting nature, then that reputation must be a fragile creature indeed. The minority consider that the reasonable person, fully apprised of the background circumstances of this offending, including the views of the sentencing judge in that there was a significant failure in duty as a director, but no impairment of integrity, would not tend as a result to have less confidence in the profession as a whole, or consider its reputation besmirched.

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[16] Bundle of Documents, at 132.

[47] The minority consider that reputation of public company directors may well have been diminished, but that this does not automatically translate into a tendency to bring the legal profession into disrepute, merely because the director who has fallen short in that role, is also a lawyer.

[48] Having regard to the dicta in *Ziems,*[17] and for the reasons given in paragraphs [16], [23-24], [28] and [46-47]. We do not consider the Standards Committee to have established tendency to bring the profession into disrepute, on the balance of probabilities.

Result

The majority of this Tribunal has found the charge proved, in respect of its second limb.

Penalty

[49] The Standards Committee is to file its submissions on penalty within 10 working days of ***the date*** of receipt of this decision. The practitioner may have a further 10 working days thereafter to file his submissions as to penalty. Counsel may confer and advise the Tribunal whether they wish a *viva voce* hearing on the issue of penalty. We would simply note there are substantial extenuating circumstances in this matter which we consider can be considered at penalty stage.

DATED at AUCKLAND this 28th day of November 2012

Judge D F Clarkson
Chair

[17] *Ziems v The Prothonotary of the Supreme Court of New South Wales*, above n 11.