NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 37
LCDT 007/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 3** Applicant
AND	**ANTHONY DAVID BANBROOK** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Mr S Maling
Ms C Rowe
Mr W Smith

HEARING in the Specialist Courts and Tribunals Centre at Auckland

DATE OF HEARING 22 May 2014

COUNSEL
Mr M Hodge for the Auckland Standards Committee No. 3
Mr S Mount for the Practitioner

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

Introduction

[1] This case concerns a lawyer of many years experience, held in high regard by his peers, appearing before the Tribunal as the result of his role as a director of one of the many 'collapsed' finance companies.

[2] Mr Banbrook is charged under s 241(d) that, having been convicted of an offence punishable by imprisonment (that is under s 58(3) of the Securities Act 1978) the conviction tends to bring his profession into disrepute.

[3] Initially the first limb of subs (d) was also pleaded, that is that the conviction reflected on Mr Banbrook's fitness to practice, but that was abandoned by the Standards Committee, having regard to the High Court decision in *Davidson.*[1]

[4] The charge is denied by Mr Banbrook who, of necessity, conceded the fact of the conviction (his appeal to the Court of Appeal having been unsuccessful[2]), but argued that in his particular case that a reasonable member of the public, fully informed of the relevant facts leading to his conviction, would not view Mr Banbrook's conduct as tending to bring the profession in disrepute.

Background

[5] The general background facts are not disputed. The key difference between the counsel for the Standards Committee and counsel for the practitioner in this matter relates to whether he is bound by the Summary of Facts in the Securities Act proceedings, to which he agreed, and upon which he was sentenced. In particular Mr Banbrook does not consider that he was guilty of "gross negligence"

[1] *Davidson v Auckland Standards Committee No. 3* [2013] NZHC 2315, Brown J.
[2] *Banbrook v R* [2013] NZCA 525.

notwithstanding the remarks of the sentencing judge, His Honour Justice Collins at [26]:[3]

> "In my assessment, your omissions are properly categorised as omissions that amount to gross negligence."

[6] Mr Banbrook also challenges those portions of the Summary which revealed deficiencies in the prospectus in a number of areas, including the reporting of related party transactions, the making of proper and adequate provision of bad debts and statements concerning the holding of non-accrual assets (acquired through the enforcement of securities). All of these areas were important matters to investors in the company, namely National Finance Limited ("NFL") which was a lower tier lending company largely set up to finance the purchase of second hand cars through car dealers. These included car dealerships which had common directorships with NFL itself.

[7] Mr Banbrook was the barrister who had the role of collecting the large debts for NFL. That connection led to an invitation to join the board.

[8] NFL had been preceded by another failed company run by Mr Ludlow who was the Chief Executive of the firm and a co-director, along with Mr Ludlow's partner, Ms Braithwaite, and an accountant Mr Gray.

[9] It is common ground that Mr Ludlow and Mr Gray, were fraudulent in relation to their dealings with the companies and actively concealed this fraud from Mr Banbrook. Understandably, Mr Banbrook feels significantly let down and betrayed by these men, on whom he relied for proper governance of the company and accurate statements in the prospectus.

[10] It is Mr Banbrook's position, when asked about his responsibility for statements in the prospectus, and indeed the company's accounts overall, that such were subject to independent audit, were under the control of an experienced accountant, the prospectus was prepared after independent advice from a large independent law firm and there were the overall regulatory bodies including the Trustee, with whom they met from time to time when concerns arose.

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[3] *Queen v Anthony David Banbrook* [2013] NZHC 462.

[11] Mr Banbrook stated that he was "merely a litigator" and that this was the principle focus for his appointment as a director. He considered that he ought to have been able to rely upon the various checks and balances, without undertaking independent inquiries given that he himself was not an accountant.

[12] What is clear to us is that Mr Banbrook was aware of Mr Ludlow's history in terms of his previously failed company, which had very similar business to that of NFL. The loan book of the previous company had been poor and therefore that poor quality lending was something about which Mr Banbrook ought to have been particularly alert. Furthermore it was put to him that he was aware for example, of repossessed vehicles existing, which information was specifically counter to that set out in the prospectus. Mr Banbrook said that he considered this information to be "immaterial".

[13] Mr Banbrook said that he attended over 50 meetings of directors during the period of time that he was a director and diligently prepared for these, read minutes, and to the best of his ability responded urgently to any difficulties arising for the company. He considers that because he carried out what he understood to be his role as a director with diligence and honesty, that he has not by reason of his plea of guilty to a strict liability offence, brought the profession into disrepute.

[14] Furthermore Mr Banbrook contended that the prospectus did not highlight his position as a lawyer (albeit the only lawyer on the board) in any particular way.

[15] In fact the description of Mr Banbrook in the prospectus is as follows:

> "**Tony Banbrook (Bsc, LL.B.A.A.AMINZ(sic), Barrister) - Director**
> Tony Banbrook graduated Bsc, LL.B from Auckland University in 1972.
>
> He was employed as a prosecutor in the Crown Prosecutor's Office in the period 1971-1975. He prosecuted for a number of Government Departments regularly including the Police and Inland Revenue Department.
>
> Tony spent 22 years as a litigation partner in the legal practice of Hesketh Henry. He specialised in commercial/civil litigation, acting on behalf of major commercial entities including Auckland City Council, Auckland Regional Council, Auckland Regional Services Trust and The Anglican Church Property Trusts. For 20 years he was the commercial litigation advisor to the National Bank of New Zealand Limited in Auckland.
>
> Tony was legal advisor to the company Instant Finance Limited in the year's following its relocation from Wellington to Auckland and was a director and legal advisor to PSC Group Limited, a forerunner of Baycorp Advantage.

> Latterly, Tony has been a consultant to national bodies in the racing industry and public trusts and companies engaged in forestry management.
>
> Tony left Hesketh Henry in 1999 to set up practice as a barrister and since that time, has appeared regularly in the Commercial Court, the High Court in different centres throughout New Zealand and in the Court of Appeal.
>
> He is an associate member of the New Zealand Institute of Arbitrators and Mediators and is committed to the resolution of commercial conflict by means of alternative dispute resolution and to the practical application of the legal process in the commercial context."

[16] In evidence Mr Banbrook attempted to make the distinction between himself as a commercial litigator and a commercial (transactional) lawyer. We did not consider that the public was likely to make that distinction when reading a prospectus in relation to a lawyer board member.

Issues to be determined

1. Is the practitioner entitled to ask the Tribunal to depart from the Summary of Facts upon which a guilty plea has been based in the present circumstances?

2. Is the practitioner able to distinguish his case from the decision of the Tribunal and the High Court in *Davidson*[4], as to the issue of what behaviour might tend to bring the profession into disrepute?

Summary of facts disputed

[17] Mr Banbrook confirmed that the Agreed Summary at his criminal hearing was accepted by him on the advice of senior counsel then representing him, following some two months of negotiation as to its contents. It was Mr Banbrook's view that he was however, effectively forced to agree to this Summary under threat of reversion to an earlier Summary of Facts which he considered contained huge distortions and posed considerable risks for him.

[18] However, this argument was also made to the Court of Appeal in late 2013 and it was rejected by the Court in these terms:[5]

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[4] *See n 1.*
[5] *Banbrook v The Queen* [2013] NZCA 525, at [25].

> "[25] In light of those concessions there was no prospect of Mr Banbrook making out a defence he had reasonable grounds to believe the statements in the prospectus were true. He had abrogated his responsibility as a director. Mr Banbrook sought to suggest that he only made these concessions in light of the position he found himself in. He submitted they were not so much agreed concessions as positions reached at the end of negotiation. He said he considered he had no choice. We do not accept that. Mr Banbrook was advised by senior counsel throughout and, as noted, could have gone to a disputed fact hearing or, prior to the guilty plea, to trial."

[19] Mr Banbrook had sought leave to appeal to the Supreme Court against this decision but leave was declined on 18 December 2013.[6]

[20] On behalf of Mr Banbrook, Mr Mount submitted that there was no rule of evidence which dictated that a document accepted for one purpose must stand for all time and for all purposes. He emphasised that the Tribunal was not conducting a criminal hearing and, while (responsibly) referring us to the Court of Appeal decision, submitted that the Court of Appeal was being asked to overturn a conviction and thus its reluctance was understandable in that context. Mr Mount submitted that the Tribunal was in a position to reconsider the situation and to accept Mr Banbrook's contention that there was not "gross negligence" on his part.

[21] For the Standards Committee Mr Hodge submitted that in the context of charges laid under s 241(d) of the Lawyers and Conveyancers Act ("the Act") it would be "an extraordinary step to go behind such a weighty document as an agreed statement of facts" in a criminal trial. Mr Hodge submitted that there was no evidential foundation for the Tribunal to take such a step.

[22] Mr Hodge did agree that for the purposes of a disciplinary hearing the Tribunal could certainly consider context, as established by the practitioner and have regard to any mitigating factors. However, Mr Hodge pointed out that the Summary of Facts was a lengthy, detailed, and careful document agreed after lengthy negotiation between the prosecuting authority and the practitioner at a time when he was being represented by a Queens Counsel.

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[6] *Banbrook v The Queen* [2013] NZSC 148.

Discussion - Issue 1

[23] We consider that there will be instances when it is proper to allow a practitioner to flesh out details in relation to criminal offending upon which a charge is based. This is likely to be more relevant at penalty stage, however on occasions, particularly if the Summary of Facts is somewhat sparse in details it may also be considered in a liability determination.

[24] In this instance, given the process which led to the Agreed Summary of Facts and given that this has already been the subject of a determination by the Court of Appeal, we do not consider that we ought to go behind it in respect of the central issues of the finding of "gross negligence" or as to the deficits in governance set out in the Summary.

[25] The Summary of Facts in this case was relied on for the purposes of sentencing and since that sentence forms a considerable basis for the determination of both liability and penalty, if relevant, in disciplinary proceedings, we are not prepared to allow the practitioner to resile from its core contents. We have however been prepared to hear Mr Banbrook's evidence on the nature of directors' meetings and the frequency. Having said that, given Mr Banbrook's own view of his role as a director, these details do not particularly assist him.

[26] Mr Banbrook's attempt to go behind the Summary of Facts is part of a wider problem which we detected in Mr Banbrook; of complete failure to accept any responsibility whatsoever for his part in the NFL collapse. Whilst we understand his very human response to having been duped, we considered he was somewhat obsessed with Mr Gray's part in the deception and subsequent company failure, rather than looking to the more obvious matters of many failures in the company and the outstanding debts, of which Mr Banbrook must have been aware given that he was frequently litigating their recovery.

[27] The answer to the first Issue for Determination must be "No".

Distinctions between the current matter and the Davidson matter

[28] In submissions on behalf of the Standards Committee, Mr Hodge pointed out that the Tribunal need only be satisfied that the conviction tended to bring Mr Banbrook's profession into disrepute. He submitted that it was "irrelevant that Mr Banbrook did not intentionally mislead investors. What matters is his gross negligence in carrying out his statutory duty as a director." Mr Hodge pointed to Mr Banbrook's profile as set out in the prospectus (see paragraph [15] above). Secondly he submitted that Mr Banbrook's conduct involved a "major departure from the standard of care expected when a director performs a statutory duty".

[29] Mr Hodge relied on the *Davidson* decision where, as with Mr Banbrook, there was acceptance that the offending involved no dishonesty or intentional wrongdoing. Notwithstanding that, it was found that the conviction did tend to bring the profession into disrepute and as to the second limb of s 241(d) of the Act the Court had this to say:[7]

> "… Mr Davidson was sold to readers of the prospectuses as an experienced commercial lawyer and as someone the investors could trust and rely upon. He failed in meeting the expectation which contributed in part to the disastrous consequences which followed. In those circumstances, given the way in which he was held out in the relevant documentation, that failure would tend to detract from or lower the reputation of the New Zealand legal profession generally."

[30] And further[8]:

> "Secondly I consider that in assessing whether a conviction could tend to bring the profession into disrepute it is legitimate to take into account the consequences which were likely to flow from the offending which gave rise to the conviction."

[31] Mr Hodge submitted that:

> "A reasonable person fully informed of the background of the offending would reasonably draw a link between the fact that one of the three directors of NFL was an experienced commercial lawyer. This must tend to reflect on the profession's reputation as a whole."

[7] See note 1 at paragraph [70].
[8] At paragraph [75].

[32] On behalf of Mr Banbrook Mr Mount submitted that the Tribunal, bearing in mind its purpose to protect the public and maintain professional standards must carefully analyse the particular facts and circumstances in considering whether a conviction will tend to bring the profession into disrepute. He pointed to the following distinctions between Mr Banbrook and Mr Davidson's case (and indeed Mr Whale's, a lawyer with a similar strict liability conviction):[9]

1. Mr Davidson was chairman of the Board whereas Mr Banbrook was simply a director with no additional responsibilities.

2. The scale of the losses in the BridgeCorp collapse (in which Mr Davidson was involved) was vastly greater.

3. Mr Davidson's reputation as a commercial lawyer was emphasised to promote BridgeCorp and attract money. Mr Mount submitted that:

   "Mr Banbrook's reputation was not prominently used in that way, and Mr Banbrook's legal role in the company was limited to occasional litigation work to recover money."

4. While accepting Mr Davidson had also been misled by Mr Petricevic, Mr Mount contrasted this with what he described as the "criminal fraud" which was "deliberately concealed in a systematic way from Mr Banbrook".

5. Mr Davidson was convicted of 10 charges rather than one conviction for Mr Banbrook.

[33] Mr Mount went on to compare the present case with another lawyer director who is not facing charges before the Committee, a Standards Committee having decided not to lay charges. We do not consider it appropriate to comment on that decision it being from an entirely different forum and not having been considered by the Tribunal.

[34] Finally Mr Mount submitted that the Tribunal ought to take into account that since Mr Davidson's case had been before the Courts, Parliament had changed the

[9] *R v Whale* [2013] NZHC 731, *Auckland Standards Committee No. 1 v Whale* [2014] NZLCDT 22.

law so that this particular strict liability offence could no longer be established against someone in Mr Banbrook's circumstances but required deliberate or reckless behaviour.

Discussion - Issue 2

[35] Returning to the distinctions suggested between the present case and Mr Davidson's case we consider that points 1 and 2 have some validity. However when comparing the present case with Mr Whale's case (practitioner suspended for 12 months by the Tribunal) we note the relevance of both Mr Whale and Mr Banbrook being the only lawyers on the Board. We do not consider that the promotion of Mr Davidson and Mr Banbrook respectively as commercial lawyers have such significant differences that they ought to create a clear distinction for penalty purposes and we do not consider that there is a sufficiently different element in the manner in which Mr Davidson and Mr Banbrook were misled, given that had either made proper independent inquiries such deceptions would have been uncovered. This forms part of the "gross negligence" finding in relation to their respective directorships.

[36] While we accept that Mr Davidson was convicted of 10 charges we do note that Mr Davidson's mitigating circumstances, the weight of his references and previous service to the legal community and community at large would more than tip the balance of this factor against Mr Banbrook. We are not saying that Mr Banbrook has not had a solid and respected career, but it is not comparable to that of Mr Davidson from which he was able to draw considerable credit.

[37] In relation to Mr Mount's submission about the change in the law, we do not consider that we can do other than consider the law as it was for the purposes of this charge.

[38] Taken overall we do not consider that the rather minor distinguishing features are sufficient to set them apart from the liability finding of the High Court in *Davidson*. We considered the distinctions are more relevant to penalty. Thus the answer to the second issue must also be "no".

[39] We find that the Standards Committee has proved to the high standard required on the balance of probabilities the charge brought pursuant to s 241(d) that the practitioner's conviction tends to bring the legal profession into disrepute.

Penalty

[40] The Standards Committee sought suspension, following from the decision in *Davidson* where Mr Davidson was suspended for nine months. We note that subsequent to that decision we have suspended Mr Whale for 12 months.[10]

[41] Mr Hodge reminded us that in the Whale matter, the High Court's finding of dishonesty was found by the Tribunal to take the offending beyond the *Davidson* situation and the practitioner was suspended for 12 months.

[42] Mr Hodge submitted that:

> "Because there is no alleged dishonesty on Mr Banbrook's part and no conflicts of interest, the Committee accepts that Mr Whale's offending is more serious than Mr Banbrook."

[43] Mr Hodge then went on to look at the criminal sentencings and acknowledged that the starting point adopted by the High Court for Mr Banbrook had been less than that for Mr Davidson. Mr Hodge submitted that notwithstanding that starting point, Mr Davidson's conduct *"… was otherwise almost identical to Mr Banbrook's …"* and in summary submitted that the Committee sought a suspension in the range of seven to nine months together with a censure of the practitioner.

[44] Mr Hodge referred us to the remarks of His Honour Brown J in *Davidson* relating to the purposes of suspension. These, in turn referred to the comments of the full court of the High Court in *Daniels.*[11] We remind ourselves of the "*least restrictive outcome*" principle referred to in *Daniels* but refer in particular to paragraph [24] of the decision:

> "[24]A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practice are given that privilege.

[10] *Auckland Standards Committee No. 1 v Whale* [2014] NZLCDT 22.
[11] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

> Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[45] In *Davidson* His Honour Brown J made it clear that nothing short of suspension would properly reflect the profession's disapproval of a conviction and its flow on effects to the profession where a lawyer director is found to be so seriously deficient.

[46] Mr Mount submitted that the lower scale of the losses and Mr Banbrook's lesser role in the company in particular, as well as the deliberate deception practiced on him could lead the Tribunal to avoid suspension. However we do not consider as we have indicated that the practitioner's culpability is so different from Mr Davidson as to avoid suspension entirely. We do accept that it can be imposed at a lower level.

[47] For Mr Banbrook it was submitted that we should take into account reparation ordered against him in the High Court. Subsequent to the hearing we became aware that Mr Banbrook was seeking to have that order reversed. That application was unsuccessful and we have now been advised that the practitioner has paid the reparation in full.

[48] Accordingly we give, as we gave to Mr Davidson and Mr Whale, credit for reparation. In Mr Davidson's case the figure of $500,000 was considerably greater than the reparation paid by Mr Banbrook of $75,000. However that is also in the context of much greater losses to the investing public. Mr Whale also paid $75,000 reparation.

[49] We do give credit to the practitioner for his payment of reparation and for the positive references provided on his behalf and for his long unblemished career as a lawyer. We do not accept the submission that a short period of suspension will end his career and we were somewhat disappointed at Mr Banbrook's adoption of a role as a victim, both before us and subsequently before the High Court in seeking release from the reparation payment.

[50] Mr Banbrook cannot claim the credit (although modestly recognised) that Mr Whale claimed for a guilty plea to the disciplinary charge faced.

[51] In all of the circumstances we consider that a suspension period of seven months is warranted. The orders we make are as follows:

1. Censure of the practitioner.

2. The practitioner is suspended from practice as a barrister or solicitor for a period of seven months commencing 14 days after the release of this decision.

3. An order against the New Zealand Law Society to reimburse the Tribunal s 257 in the sum of $4,606.

4. Respondent to make submissions as to costs claimed by the Standards Committee, including reimbursement of the s 257 costs, within 10 days of the release of this decision.

DATED at AUCKLAND this 1st day of July 2014

Judge D F Clarkson
Chair