

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2011] NZLCDT 38

LCDT 011/11

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**THE SOUTHLAND STANDARDS
COMMITTEE OF THE NEW
ZEALAND LAW SOCIETY**
Applicant

AND

LOUIS RAYMOND EVANS
Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Mr S Grieve QC

Mr A Lamont

HEARING at AUCKLAND on 24 November 2011

APPEARANCES

Mr P Collins for the Applicant

Mr C Pidgeon QC for the Respondent

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

[1] The practitioner has admitted two charges of misconduct. The charges are as follows:

Charge 1

Whilst acting in the administration of a deceased estate, he prepared a statutory declaration for the purpose of the transmission of the deceased's property to his sole executor, and:

1. He submitted the declaration to the solicitor separately acting for the executor, for signing by the executor, knowing that it would be relied on as being true, in circumstances where;
2. The declaration was untrue and he knew it to be untrue.

He thereby failed to promote and maintain proper standards of professionalism in his dealings with a fellow lawyer, contrary to Rule 10 of the *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008* and misled and deceived a fellow lawyer contrary to Rule 11.1.

Particulars

- (a) Mr Evans acted in the administration of the deceased estate of one K B, formerly of W, who died on 5 June 2009. In that capacity, on or shortly before 1 July 2010, he prepared an application for the transmission of the deceased's property (unique identifier CB12K/1256) to the sole executor, L B, of W, which included the following declaration by Mr L B:

"I am the executor of the will of the estate of K B deceased by virtue of Probate granted to me by the High Court of New Zealand on 31 March 2010."

- (b) The declaration was submitted to the solicitor acting for Mr L B, Mr W, at W, with the intention that Mr W would facilitate the signing of the declaration by Mr L B;
- (c) Mr Evans knew that the declaration was false because he knew that probate had not been granted and that the reference to probate being granted on 31 March 2010 was fictitious; and
- (d) As a consequence, on 5 July 2010, Mr L B signed a statutory declaration (which Mr W administered) that was false.

Charge 2

In the administration of the same estate, he provided a certificate to Land Information New Zealand, for the purpose of the transmission of the deceased's property to the executor, which was false and which he knew to be false, contrary to s.164A of the Land Transfer Act 1952 and Rule 2.5 of the *Conduct and Client Care Rules*.

Particulars

- (a) On 6 July 2010 Mr Evans completed the electronic transmission of the estate property to the executor. The transmission was accompanied by a certificate in which he stated, among other things:
- (i) "... that I have the authority to act for the Applicant and that the party has the legal capacity to authorise me to lodge this instrument";
 - (ii) "... that I hold evidence showing the truth of the certifications I have given and will retain that evidence for the prescribed period";
 - (iii) "... that the Applicant is entitled to be registered as proprietor by virtue of transmission."
- (b) These statements were all untrue (and the certificate was therefore untrue) because:
- (i) Probate had not been granted to the executor at the time of the certificate and the executor therefore lacked the legal capacity to authorise the lodgement of the transmission instrument;
 - (ii) Mr Evans was not in possession of evidence showing the truth of the statements in the certificate because probate had not been granted to the executor at the time; and
 - (iii) In the absence of a grant of probate, the executor was not entitled to be registered as executor by transmission.
- (c) The statements specified in Particulars (a)(i)-(iii) above were given contrary to the requirements of s.164A(3)(a) & (d) of the Land Transfer Act 1952.
- (d) Mr Evans had no reasonable grounds for believing that his certificate was true and had not taken steps to ensure the accuracy of the certificate, in breach of Rule 2.5 of the *Conduct and Client Care Rules 2008*.

[2] A penalty hearing was held on 24 November 2011, at the conclusion of which the Tribunal announced the orders to be made against the practitioner, but reserved reasons for our decision. These are the reasons for the penalties imposed.

[3] The background is as set out in the particulars supporting the charges and we do not propose to repeat that.

[4] We accept the submission of Mr Collins that, in terms of the statutory definition of misconduct contained in s.7 of the Lawyers and Conveyancers Act 2006 (“LCA”) that the behaviour complained of was such as “*would reasonably be regarded by lawyers of good standing as disgraceful and dishonourable*” (s.7(1)(a)(i)). In addition it also involves “*.. wilful or reckless contravention of the Rules made under the Act*” (s.71(a)(2))¹.

Deception of a fellow practitioner

[5] A dishonest statement was made by the practitioner to a fellow lawyer knowing that it would be relied on. We accept Mr Collins’ submission that it cannot be explained as a mere slip, it was clearly a means of covering up the practitioner’s error or oversight. As such it falls well below the standards of integrity and professionalism required of legal practitioners. All lawyers must be able to rely on their colleagues to behave with absolute integrity and work within the profession depends on this understanding and confidence.

Providing a false certificate to Land Information New Zealand

[6] Providing a false certificate, in breach of s.164A of the Land Transfer Act 1952 is in fact a criminal offence. The “Land on Line” system depends on the integrity of lawyers working within the system. Once again the profession is entitled to expect that its members will respect the privileges of legal practice by working within its constraints and observing all Rules and Regulations prescribed for lawyers.

Penalty

[7] The Standards Committee sought a suspension for six months, a fine and an order censuring the practitioner, as well as costs. The Standards Committee referred us to a number of aggravating features: such as the wilfulness of the conduct; the false certificate breaching the very heart of the “Land on Line” system; and finally,

¹ This is a typographical error in the issued decision, the correct reference is s.7(1)(a)(ii).

and most importantly from the Tribunal's point of view, the practitioner's past disciplinary record.

[8] We were made aware of three previous findings of Disciplinary Tribunals against the practitioner.

[a] The most recent was March 2006 where the practitioner admitted charges of misleading and untruthful statements to a client in relationship property proceedings. He was censured, fined and ordered not to accept work or hold himself out as competent to work in a Court or Tribunal for 10 years.

[b] The next was 20 years ago, in 1991. However, again the practitioner admitted four charges of misconduct relating to breaches of the Audit Regulations and Trust Account Rules. The New Zealand Law Practitioners Disciplinary Tribunal had clearly considered strike off on this occasion because of the seriousness of those matters, but was impressed by the practitioner's "candour and honesty" in the giving of his evidence. The practitioner was censured, fined and ordered not to practice as a solicitor on his own account until authorised to do so.

[c] One year prior to that in March 1990, the practitioner had also admitted to the District Disciplinary Tribunal that he had made untruthful statements to the trustees of a deceased estate concerning the progress of the administration of that estate, (which is a situation close to the present one).

[9] A consistent theme was of the practitioner's willingness to admit his wrongdoing once confronted but seemingly unable to maintain a standard of professionalism and behaviour that prevented repetition.

[10] For the practitioner, Mr Pidgeon pointed to the co-operative approach of the practitioner, from the outset. He advised the Tribunal that the situation had been rectified as far as the client was concerned and that there was no personal benefit to the practitioner. Mr Pidgeon submitted that a degree of punishment had already been imposed in that the practitioner was no longer able to provide certificates for the "Land on Line" system.

[11] A number of references were provided which spoke very positively of the practitioner, in particular from his employer, who vouched for the practitioner's knowledge and capability in numerous aspects of conveyancing and commercial law. He was said to be someone to whom other practitioners frequently turned to for advice. The practitioner is clearly a popular man with clients, staff of the firm, and other practitioners and it was submitted that striking him off would mean a loss to the public as well as a loss to the practitioner. He was prepared to co-operate with any requirements which the Tribunal would impose. A former President of the Southland District Law Society, Mr Mee, also gave a detailed reference in support of the practitioner.

[12] The practitioner's financial resources are modest and clearly being unable to practice as a lawyer will involve further penalty being suffered by him.

[13] However, it has often been pointed out that the primary purpose of the Tribunal's imposition of penalties is not a punitive one. It is to be a multifaceted response, the primary purpose of which is protection of the public and of the reputation of the profession, as well as preventing a repetition of the behaviour concerned.

[14] It is this latter issue, namely the repeated nature of the practitioner's offending which most concerns the Tribunal. To reflect the seriousness of repeated offending, we consider that a more substantial penalty than that urged by the Standards Committee is required to register with the practitioner how his actions are regarded.

[15] We respectfully adopt the comments of the High Court in *Daniels v Complaints Committee No. 2 of the Wellington District Law Society*,² in particular at paragraphs [22] and [24]:

[22] It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishing, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate

² High Court Wellington, CIV 2011-485-000227 [8 August 2011] Gendall, MacKenzie, Miller JJ

response. That is “the least restrictive outcome” principle applicable in criminal sentencing. In the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practising for a fixed period will be required.

...

[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 in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. 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.

[16] For all of these reasons we confirm the orders made in our oral decision of 24 November 2011, namely:

- [a] The practitioner will be suspended for 12 months from 24 November 2011.
- [b] There will be a censure of the practitioner.
- [c] The practitioner is to pay a total of \$20,000 costs to the New Zealand Law Society in respect of their costs and reimbursement of the s.257 costs to be awarded, to be apportioned as the Law Society sees fit. We recommend that the Law Society accommodate payment by instalments for the practitioner.
- [d] The New Zealand Law Society is to pay costs of the Tribunal in the sum of \$5370.
- [e] There will be a suppression order in relation to the name of the firm, the client and the other lawyers involved in this matter. In all other respects the decision is able to be published.

DATED at AUCKLAND this 23rd day of December 2011

Judge D F Clarkson
Chair