NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 39

LCDT 013/15

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NELSON STANDARDS COMMITTEE** Applicant
AND	**ANTHONY (TONY) BAMFORD** Solicitor

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Bishop

Mr W Chapman

Mr A Marshall

Mr W Smith

HEARING 23 October 2015

HELD AT Wellington

DATE OF DECISION 17 November 2015

COUNSEL

Mr D Webb for the Standards Committee

Mr A Darroch for the Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Bamford admitted to (amended) charges of unsatisfactory conduct and appeared before the Tribunal for a penalty hearing on 23 October. Counsel had provided an agreed facts summary in advance of the hearing. We heard some limited evidence from Mr Bamford and submissions from both counsel. Having considered these, we gave a brief oral decision which we advised the outcome in a broad sense, reserving reasons for our decision. This decision provides those reasons.

Background to charges

[2] The charges arose out of Mr Bamford's response to an error of one of his staff members, when that person failed to complete the GST question in an agreement for sale and purchase. Th staff member has already been dealt with by the Standards Committee.

[3] As a result of the omission, the purchaser's solicitor, surprisingly, completed the GST question which related to the vendor's GST status without drawing this to the attention of Mr Bamford's firm, or employee. Consequently, Mr Bamford's client needed to reduce the purchase price by a significant sum. Mr Bamford's firm became aware of this error on 18 February 2014, and settlement was scheduled for 7 March 2014.

[4] The unsatisfactory conduct, which is admitted, is that Mr Bamford did not immediately upon becoming aware of a possible claim against his firm – therefore a conflict of interest – send his client away to obtain independent advice. Rather, Mr Bamford and his employee focused on resolving the issue for the client. It was not until the client made it plain, on 5 March 2014, that he would be looking to the firm to recompense him for his loss, that Mr Bamford advised his client of the need for him to obtain independent advice. The client declined the offer at this stage; he was

anxious for settlement to proceed because the sale transaction supported a related purchase transaction.

[5] The second charge, of a less serious nature, arose because Mr Bamford was dilatory in his subsequent response to the client's complaint against the firm. He took two months to make a claim on his insurance, and rather than formally responding to the client in writing, telephoned him and then "went silent" with the client, while he awaited the insurance company response.

[6] To complete the contextual matters, we accept that the negotiation between the lawyer, his insurer and the client achieved a settlement. And we note this was complicated by the fact that the client (unexpectedly as far as we are aware) received a significant GST refund, far in excess of the loss created by the initial error.

Seriousness of the conduct

[7] On behalf of the Standards Committee, Mr Webb acknowledged this matter would not have come before the Tribunal but for two factors:

[a] The practitioner's slow response to the client, the subject of the second charge; and

[b] The cluster of previous complaints and disciplinary findings against him.

[8] The duty which was breached by Mr Bamford is set out in Rule 5.11, which governs the situation once a practitioner becomes aware of a potential claim against him or her. The rule mandates that the client must be advised to seek independent advice and also informed that the practitioner can no longer continue to act unless, having received independent advice, the client gives informed consent to that. We accept the submission of Mr Webb that this rule is "prophylactic in nature". Because of the risks involved in conflicts of interest, in which it is sometimes difficult for a practitioner to accurately identify the various interests, the decision must be removed from the practitioner and put in the hands of the client, on an informed basis.

[9] Mr Bamford has acknowledged, by his plea, that he let his client down in this regard.

[10] We record that it is extremely important for a practitioner to recognise and clearly turn his or her mind to the consequences where a possible claim against a practitioner becomes apparent. Having said that, we note the context that this error occurred at a time when the practitioner was under extreme pressure from his workload and at a time when he was recovering from a serious illness. We refer to this as a contextual matter only as it cannot provide a strong mitigatory factor in the absence of specific medical evidence (as to any impact on the practitioner's functioning at the time).

[11] We also note the context that the practitioner was dealing with a strong client who wanted settlement to proceed and in whose best interests it was to proceed and that the practitioner directed his energies to this end rather than examining the implications for himself professionally. Thus we do not regard this as "high end offending".

[12] The Standards Committee sought that the practitioner be suspended for a three month period. It was submitted that, given the seriousness of the first charge and the adverse previous findings, suspension was required to:

[a] Mark the conduct as unacceptable;

[b] Provide deterrence, both specific and general; and

[c] Protect the reputation of the profession.

Aggravating features

[13] Mr Bamford has been in practice for 26 years and until recently had an unblemished disciplinary history. However between April 2014 and January 2015 he has sustained three findings of unsatisfactory conduct by the Standards Committee. The first of these, and the most serious, involved very poor service being offered to a client, in that there was some four years delay in acting on instructions provided to him. A significant penalty was imposed against Mr Bamford by the Standards Committee.

[14] The July 2014 matter was less serious, but once again was an example of poor communication. The final matter involved a conflict of interest also but an unintentional one when Mr Bamford represented a defendant in a criminal matter, unaware that a member of his firm had acted for the complainant previously. Although this is serious, we are satisfied that Mr Bamford has put in place arrangements to avoid any recurrence.

[15] We do note that during 2013 and indeed back to 2012 Mr Bamford had been suffering from a serious illness. He was operated on in September 2013 and says that he noted improvement in his general performance and physical wellbeing within some six months of the operation.

[16] Other than this cluster of previous findings of unsatisfactory conduct there are no aggravating features.

Mitigating Factors

[17] We consider the mitigating features to be as follows. Firstly the practitioner immediately acknowledged his error and expressed his regret. He has been cooperative with the disciplinary process and, following the filing of amended charges reducing the previous misconduct charges to unsatisfactory conduct, he acknowledged responsibility and through his lawyer negotiated an agreed statement of facts in order to facilitate the process and minimise costs.

[18] He has negotiated a (confidential) settlement with his client.

[19] He has made significant changes to his practice, in particular has engaged with a senior practitioner to meet for regular professional advice and assistance in the management of his practice.

[20] In terms of an earlier order of the Standards Committee he has completed an Ethics Course.

[21] He has taken on additional staff so that his workload will not be at the point where it previously impacted on his ability to properly service the needs of his clients.

[22] In relation to the offending itself we accept that the practitioner was not motivated by self interest; andthat he did, albeit belatedly, offer the client independent advice.

[23] At the Tribunal's suggestion the practitioner agreed to formalise the mentoring arrangement with Mr Paul Le Gros for a period of two years.

Decision

[24] We were referred to a number of decisions of the Tribunal and of the Higher Courts, but as is often the case each matter can be seen as quite fact specific.

[25] We note the dicta in *Daniels*[1] as to the principle of least restrictive intervention, and the credit to be given for a practitioner's cooperation:

> "… obviously, matters of good character, reputation and absence of prior transgressions count in favour of the practitioner. So, too would acknowledgement of error, wrongdoing and expressions of remorse and contrition. For example, immediate acknowledgement of wrongdoing, apology to a complainant, genuine remorse, contrition, and acceptance of responsibility as a proper response to the Law Society inquiry, can be seen to be substantially mitigating matters and justify lenient penalties …"

[26] While the previous findings against the practitioner meant the matter was finely balanced in relation to a brief period of suspension, in the end we considered that this particular conduct did not demand such an intrusion on the practitioner's firm.

[27] Instead, we considered, having regard to the level of offending, that Censure and the imposition of a fine of $5,000, was a proportionate response.

[28] In imposing a censure Mr Bamford, this Tribunal is expressing on behalf of the public and the legal profession extreme dissatisfaction with your behaviour in failing to observe what should have been seen as a fundamental obligation to comply with Practice Rules. This failure maybe seen as an error of judgment but if so, it is an error that deserves adverse criticism. A censure will remain always a part of your disciplinary record and will hopefully cause you to reflect on your failings and ensure that such failings do not occur again.

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[1] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850, at [28].

Costs

[29] Because of the practitioner's plea and agreed statement of facts there was no real need to test evidence and costs are reflective of that. However we consider that practitioners who adopt a cooperative approach ought to receive some credit. In all of the circumstances we consider that the practitioner ought to contribute $10,000 to the Standards Committee costs and pay all of the s 257 costs which will be directed against the New Zealand Law Society.

Orders

[30] The summary of orders is as follows:

1. The practitioner is censured in the terms of paragraph [28]

2. The practitioner is fined the sum of $5,000.

3. The practitioner is ordered to undertake advice pursuant to s 156(1), in terms of the attached arrangement in Schedule 1.

4. The practitioner is ordered to contribute the cost of $10,000 to the costs of the Standards Committee prosecution.

5. The New Zealand Law Society is to pay the s 257 costs of the Tribunal which are certified in the sum of $4,307.00.

6. The practitioner is to reimburse the New Zealand Law Society for the full s 257 costs.

7. Application for permanent name suppression declined.

DATED at AUCKLAND this 17th day of November 2015

Judge D F Clarkson
Chair

Schedule 1

Arrangement with Mr Le Gros

We have agreed to put the following in place for the next two years:

(a) Meeting at least once each two months to discuss your practice;

(b) The meetings are to be held in either of our offices and will be directed towards the management of complaints and any other client-related issues which arise;

(c) We will review Bamford Law's complaints procedure and consider whether your terms of engagement can be improved. It may be that I will become an alternative contact for clients who are not satisfied with your response to their questions and complaints;

(d) You will ensure all your employees are aware of the improved complaint procedure and the option to involve me in any issues which arise;

(e) You will ensure any complaints or issues which arise are referred to you for discussion if they cannot be resolved with an initial response;

(f) You will pay for my involvement on a time and attendance basis at $350 per hour plus GST; and

(g) At six month intervals, I will report by email to the Legal Standards Officer in Nelson (currently Mrs Cathy Knight) to confirm that these steps are being carried out and to confirm whether or not satisfactory progress has been made on the matters outlined above.

This arrangement will terminate in November 2017. We can review whether you would like to continue to meet on a more informal basis after this date.