NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 39

LCDT 019/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**THE HAWKE'S BAY LAWYERS STANDARDS COMMITTEE** Applicant
AND	**BRIAN RICHARD HANCOCK** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr P Shaw

Mr W Smith

Mr S Walker

HEARING at AUCKLAND on 9 December 2011

APPEARANCES

Mr P Collins for the Applicant

Mr G W Calver for the Respondent

PENALTY DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This decision concerns the penalty to be imposed on Brian Richard Hancock who has pleaded guilty to the following charges brought by the Hawke's Bay Lawyers Standards Committee of the New Zealand Law Society.

Disciplinary Charges
Laid by Hawke's Bay Standards Committee

Hawke's Bay Lawyers Standards Committee charges Brian Richard Hancock, of Hastings, with misconduct, including, in relation to the acts or omissions occurring on or after 1 August 2008, misconduct under ss.7(1)(a)(i) and (ii) of the Lawyers and Conveyancers Act 2006 ("LCA") and, in respect of Alternative Charge 7 unsatisfactory conduct under s.12(a), (b) & (c) LCA:

Charge 1 - Persistently Overdrawn Trust Account - Law Practitioners Act 1982 ("LPA")

Whilst in practice on his own account as a sole practitioner, prior to 1 August 2008, he permitted his firm's accounts within the trust account to be overdrawn in a manner that was both persistent and substantial, and he was thereby in breach of s.89(1) LPA, Regulation 5(2) of the Solicitors' Trust Account Regulations 1998 ("STAR 98"), and Rule 5.01 of the Rules of Professional Conduct for Barristers and Solicitors ("RPC").

Particulars:

(a) He maintained two accounts within the firm's trust ledger comprising the firm's interest in the trust account:

   (i) Account designated 0001/01 being the firm's interest in the trust account; and

   (ii) Account designated 0001/02 being the firm's fee account;

(b) The two accounts jointly comprised the firm's interest in the trust account (and are jointly described as "the FIT account");

(c) The overdrawing of the FIT account occurred when there was a net debit balance in the 0001/01 and 0001/02 accounts; and

(d) The FIT account was overdrawn during the period 15 January 2007 to 20 May 2008 on the dates and in the amounts specified in Schedule 1.

Charge 2 - Persistently Overdrawn Trust Account - LCA

Whilst in practice on his own account as a sole practitioner, from 1 August 2008, he permitted the FIT account to be overdrawn in a manner that was both persistent and substantial, and he was thereby in breach of s.110(1)(b) LCA and Regulation 6(3) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (“LTAR”).

Particulars:

The FIT account was overdrawn during the period 20 August 2008 to 11 April 2011 on the dates and in the amounts specified in Schedule 2.

Charge 3 - Concealment of Overdrawn Trust Account - LPA

In circumstances of the overdrawing of the FIT account described in Charge 1, he retrospectively completed trust account receipts for the purpose of showing a credit entry at the month end for the months February to June 2007 inclusive, concealing the overdrawn status of the trust account, in breach of Rules 4(3) and 6 of the Solicitors’ Trust Account Rules 1996 (“STAR 96”), Regs 3(1)(b) and 6 STAR 98, and Rule 5.01 RPC.

Charge 4 - Concealment of Overdrawn Trust Account - LCA

In circumstances of the overdrawing of the FIT account described in Charge 2, he retrospectively completed trust account receipts for the purpose of showing a credit entry at the month end for the months:

(a) January and February 2009

(b) June to December 2009;

(c) February 2010;

(d) April to December 2010;

(e) January and February 2011.

He thereby concealed the overdrawn status of the trust account, in breach of s.112(1)(a) LCA, Regs 11(1) & (2) and 14 LTAR 2008 and Rule 11.1 Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008.

Charge 5 - False Trust Account Compliance Certificates - LPA

In his capacity as Trust Account Partner, as defined in Rule 16(1)(b) STAR 96, he issued monthly compliance certificates for the months January to July and December 2007, and January to March 2008, which were false by reference to Rules 17(1)(a), (b), (c) & (d) STAR 96.

Particulars:

In each of the specified monthly certificates he certified for the particular month that:

(a) The trust ledger was correctly reconciled with the corresponding trust bank accounts for the general trust account;

(b) The Trust account records were a complete and accurate record of transactions during that month and of each client's position;

(c) He was satisfied that the trust account transactions had been in accordance with client instructions and were completed, properly accounted for to clients; and

(d) He had complied with STAR 96 and STAR 98.

Those certificates were untrue because of the overdrawn status of the trust account as specified in Charge 1 and, in relation to the certificates for February to June 2007, because of the false reconciliations at months' end as specified in Charge 3, and they were given without reasonable or sufficient grounds for his satisfaction as to their truthfulness.

Charge 6 - False Trust Account Compliance Certificates - LCA

In his capacity as Trust Account Supervisor, as defined in Reg 16(1)(b) LTAR, he issued monthly compliance certificates for and including the months August 2008 to March 2009, and June 2009 to February 2011 inclusive, which were false by reference to Reg 17(1) LTAR.

Particulars:

In each of the certificates for the specified months he certified for the particular month that:

(a) The trust ledger was correctly reconciled with the corresponding bank trust accounts for the general trust account;

(b) The trust account records were a complete and accurate record of transactions during the month and of each client's position;

(c) Trust account transactions had been in accordance with client instructions and, were completed, properly accounted for to clients; and

(d) He had complied with the LTAR.

Those certificates were untrue because of the overdrawn status of the trust account as specified in Charge 2 and because of the false reconciliation at months' end as specified in Charge 4, and they were given without reasonable or sufficient grounds for his satisfaction as to their truthfulness.

Charge 7 - Dormant Balances

As at May 2011, he held funds in his trust account comprising 34 general trust balances in the total sum of $36,193.36 and 39 interest bearing deposit trust balances in the total sum of $267,672.74 which had been dormant for periods in excess of three years, and in respect of which no statements had been given to the clients, contrary to Reg 12(7)(b) LTAR.

Alternative Charge 7 - Dormant Balances - Unsatisfactory Conduct

As at May 2011, he held funds in his trust account comprising 34 general trust balances in the total sum of $36,193.36 and 39 interest bearing deposit trust balances in the total sum of $267,672.74 which had been dormant for periods in excess of three years, and in respect of which no statements had been given to the clients, contrary to Reg 12(7)(b) LTAR and amounting to unsatisfactory conduct by reference to s.12(a), (b) & (c) LCA.

[2] At the hearing the Standards Committee indicated that they would pursue in respect of Charge 7, the alternative charge of unsatisfactory conduct rather than misconduct.

[3] It will be noted that the misconduct complained of spans the period of operation of the Lawyers and Conveyancers Act 2006 ("LCA") and the Law Practitioners Act 1982 ("LPA"). Thus when addressing the totality of the offending the Tribunal must bear in mind the penalty regimes of both statutes. Having said that we consider that in respect of misconduct of the kind under consideration, the approach is the same.

[4] Misconduct is defined in the LCA as:

7 Misconduct defined in relation to lawyer and incorporated law firm

(1) In this Act, misconduct, in relation to a lawyer or an incorporated law 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 of incorporated law firm or of any other Act relating to the provision of regulated services;

[5] Misconduct under the LPA is not defined however has been well described to include the following ".. a range of conduct may amount to professional 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."[1]

[6] Six charges of misconduct and one charge of unsatisfactory conduct are admitted.

Background

[7] In 2007 Mr Hancock's trust account was audited by a New Zealand Law Society inspector who reported that the firm's interest in the trust account (FIT) and the firm's fees account were "on a combined basis frequently overdrawn". The breaches of the Trust Account Regulations 1998 and Solicitor Trust Account Rules 1996 were drawn to Mr Hancock's attention by the inspector as was the fact that his monthly reports had not disclosed these overdrawn balances. At that point Mr Hancock gave the inspector an assurance that this would not occur again.

[8] On 13 April 2011 a further routine trust account inspection was begun. At the beginning of the inspector's first meeting with Mr Hancock he immediately disclosed that he had had a practice of overdrawing the firm's fees account by transferring funds into his office bank account in excess of amounts available. Mr Hancock was completely open with the inspector and described himself as being enormously relieved that he was now able to share what had become an unbearable burden of the mismanagement of his firm's trust funds.

[9] Mr Hancock has been a sole practitioner for a number of years. Sadly, for Mr Hancock, his entry into sole practice was not a happy or easy one. He had some difficulties with the dissolution of his previous partnership including taking over a number of dormant balances and difficult files from a practitioner who had begun to succumb to dementia. Around the same time Mr Hancock's own marriage broke up and this caused him further financial and other stress.

[1] *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 [33].

[10] Over the course of the years from 2006 it is clear he had accounting difficulties. He changed his accounting system from the Auckland District Law Society Bureau System to the Junior Partner System, with which he found he had problems. Instead of seeking help with these problems he simply continued to rely on a part-time staff member for the trust accounting work, including the monthly balance. Mr Hancock was generally not present at the same time as this employee, because she worked outside normal office hours. He had very little staff support in respect of his legal work either. He found himself working longer and longer hours for lower and lower reward and spiralled into more debt despite his best efforts.

[11] From the references which we have been provided and from the statements of his two colleagues, who subsequently took over his practice and employed him, Mr Hancock is a man who puts his clients' needs ahead of his own administrative efficiency and good business practices.

[12] Mr Hancock is clearly admired and respected by his clients and by colleagues alike and it is this aspect of the case which makes even more tragic, the situation he then allowed to develop.

[13] To summarise the situation he developed a practice of transferring funds from the trust account to the fees account at the end of each month and returning them following the month's balance having been achieved in the books. He avoided detection of these blatant breaches of the Regulations and of his professional ethics by providing false trust account certificates to the Law Society for four years. A summary of the misconduct, stated bluntly is as follows:

- The Trust account was consistently overdrawn for four years.

- Thus client money was used to fund the ongoing practice.

- Each month the cheques drawn on the practice account were retrospectively entered in the trust account records in a premeditated and systematic way to conceal the overdrawn state of the account at month end.

- Monthly lawyers trust account certificates were knowingly falsified and signed for four years.

- The practitioner acknowledged the false certificates were to avoid detection by the inspectorate.

- There is no suggestion that the practitioner could be excused by unfamiliarity or inexperience, having practiced for some 36 years and been responsible for a trust account for many of those years.

- The disclosure of wrongdoing was not made until the Law Society inspector arrived to see the practitioner and remedial action to restore the trust account to its proper level was not taken until after this disclosure.

[14] It is clear that Mr Hancock was burdened by constant feelings of guilt, however did not feel able to seek help because he had allowed himself to become professionally isolated and was afraid of the humiliation and consequences of his actions.

[15] It is notable that Mr Hancock was never at any times in arrears with his rent or wages and talked about pressure from his bank in relation to his firm's overdraft but allowed these matters to take priority over his client's rights and his fiduciary obligation to his clients.

[16] His conduct strikes at the heart of the Financial Assurance Scheme put in place by the New Zealand Law Society in the late 1990s in which practitioners were entrusted with the responsibility to report trust account concerns voluntarily.

[17] The objectives of the Financial Assurance scheme are:

- Ensuring compliance with the act, regulations and any practice rules

- Detecting theft or behaviour likely to result in loss of client money

- Discouraging improper practices in the handling of money entrusted to lawyers

- Demonstrating there is an effective scheme in place

[18] Mr Hancock's conduct was designed to avoid those objectives.

[19] In cross examination the form of the monthly trust account certificate was put to the practitioner and he acknowledged that in respect of each item which he was required to answer, that his statement was wrong in every particular. He conceded that there was a regular *"money go round"* to conceal the ongoing overdraw of the trust account and the use of the client funds.

[20] Once he knew that the inspector was to attend and would discover the irregularities the practitioner arranged to borrow further funds, having exhausted his own personal funds to a large extent, from his elderly father. Thus there is no question of any client being out of pocket as a result of his defaults.

[21] Although he acted dishonesty there is no question also that this was in any way for his personal gain in terms of any intention to profit. He is the only person to have suffered overall loss in this "*train wreck".* He has now had to dispose of his practice for no consideration and has been acting as a law clerk to the two staunch colleagues who came to his rescue. The practitioner has paid a high professional and personal price for this lengthy misconduct.

Submissions for the Standards Committee

[22] Mr Collins on behalf of the Standards Committee sought that the practitioner be struck off the role of Barristers and Solicitors. He submitted that the combined effect of a number of factors, set out as follows, meant that this was a case of misconduct at the serious end of the scale.

(a) That the trust account was persistently overdrawn in significant amounts of money over a period in excess of four years (counterpart charges 1 & 2);

(b) That the respondent was funding the costs of running his legal practice - wages, office expenses and the like - from client trust money during this period;

(c) *That the mode of concealment was premeditated and systematic (counterpart charges 3 & 4);*

(d) *That the respondent admitted that he was motivated to avoid detection by the Inspectorate;*

(e) *The fact that the respondent was a lawyer of 35 years standing including 11 years in sole practice and there can be no suggestion that he is excused by unfamiliarity or inexperience; and*

(f) *The fact that he awaited detection before admitting his wrongdoing and that he only took steps to remedy the trust account deficit after he knew that the Law Society inspector was coming to see him and that the truth would be revealed.*

[23] Mr Collins accepted that there was a need to consider whether a lesser penalty, such as suspension might adequately address the objectives contained in the Act; namely public protection and the maintenance of confidence in the profession as a whole. He submitted that a lesser response could not achieve the objectives.

Submissions for the practitioner

Counsel for Mr Hancock drew the Tribunal's attention to the following factors:

(1) The practitioner is a first offender.

(2) That the overdrawing of the trust account was not in the nature of a deliberate defalcation (for personal gain).

(3) The sums involved were very modest.

(4) That no loss to clients resulted because the shortfall was repaid.

(5) No criminal charges have resulted.

(6) The practitioner found himself in “a perfect storm” of difficulties with workload; staffing problems; personal inefficiency, dissolution of partnership; marriage breakup and the financial flow-on effects of the latter two factors.

(7) That the practitioner had had difficulties in changing accounting systems, had rudimentary computer skills and was inefficient in preparing invoices for work carried out.

(8) It was pointed out that incorrect staff advice had contributed to the respondent not understanding the Junior Partner system. It has to be said that we did not give this factor very much weight.

[24] Finally Mr Calver, on behalf of the practitioner, produced for the Tribunal’s consideration two psychiatric reports from Dr Anne Walsh, which referred to the practitioner’s depressive illness particularly during the period under consideration. These reports were not provided by way of excuse, but rather were tendered as an explanation for the illness being explanatory of a heightened tendency to fail to confront problems, maintain personal and professional isolation, and the diminution in organisational ability.

[25] The second report confirmed that since the change of professional status had occurred and Mr Hancock had been relieved of all of the administrative tasks and responsibility for the management of the firm, that his mental health had improved considerably. Mr Collins submitted that whilst the second report demonstrated an improvement in Mr Hancock’s condition his evident fragility was such that his being a fit and proper person was open to doubt.

Discussion

[26] Both counsel referred us to a number of decisions including *Bolton v Law Society*[2] where the following was said:

> “Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect

[2] [1994] 2 All ER 486, 491

severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal."

[27] Following a reminder that the primary purpose of the Disciplinary Tribunal is not punitive but rather protection of the public and maintenance of public confidence in the profession, the Court had this to say about matters in mitigation of penalties:[3]

> "Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learnt his lesson and will not offend again. ... All these matters are relevant and should be considered but none of them touches the essential issue, which is 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. ... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits but that is a part of the price."

[28] We were also referred to the decision of *Shahadat v Westland District Law Society.*[4] The *Shahadat* case involved a serious conflict of interest with a client for personal gain. At paragraph [31] there is a discussion of dishonesty which we consider is relevant in the present matter.

> "It is important to bear in mind that "dishonesty" can have different connotations (It may describe criminal acts. But it may comprise acting deceitfully towards a client or deceiving a client through acts or omissions). "Dishonourable" behaviour on the part of a practitioner may well be different to that which is seen to be "dishonest" in the fraudulent sense. "Dishonest" may carry a connotation of "fraudulent", whereas "dishonourable" behaviour may cover a wide range of disgraceful, unprincipled, wrongful acts or omissions comprising blatant breaches of duties owing by a professional person."

[29] In the *Shahadat* case the High Court having considered the *Bolton*[5] decision, had this to say:

> "[34] ... Grave misconduct, which this was, not only reflected upon the fitness of the practitioner to continue in practice but in this case led to the proper conclusion that nothing short of striking off was necessary in the public interest.

[3] At page 492
[4] [2009] NZAR 661
[5] As above

> [35] That public interest is perhaps threefold. First, it is crucial that members of the public have confidence in the absolute integrity and probity of members of the legal profession. That is so they can consult and confide in those lawyers with confidence that their interests would always be protected and advanced, and not abused or ignored. If the public did not have such confidence, then the proper practice of the law would be inhibited.
>
> [36] Secondly, the profession itself must see that its reputation is upheld and advanced. They must ensure that members of the community, that is the public, see and understand that serious misconduct would not be treated lightly by those entrusted of imposing discipline upon the profession in order to protect the public.
>
> [37] Thirdly, the profession itself must see and understand, whether from the point of general deterrence or otherwise, that serious defaults and breaches of fiduciary duty or dishonourable behaviour by practitioners, will not be countenanced and if those defaults show that a practitioner is unfit to remain as a member of the profession, then striking off is likely to follow."

[30] We have been influenced by the fact that the practitioner in the present matter was warned in 2007 that he was clearly in breach of the Solicitors Trust Account Regulations. In response he gave his assurance that this would not continue. Despite that assurance he knowingly continued the practice for four further years ceasing it and making good the shortfall in the trust account/FIT only when he became aware that an inspection was imminent.

[31] We are mindful of our functions in considering penalty (as noted in Daniels)[6] and gave careful consideration to whether the matter could be dealt with by way of suspension.

[32] Having regard to all of the matters referred to above which have been put before the Tribunal by both counsel, we do not consider how any response short of strike off is sufficient to reflect the serious misconduct in this case. Accordingly we order that the practitioner be struck off the roll of Barristers and Solicitors. This is the unanimous view of five members of the Tribunal in terms of s.244 of the LCA and s.112 of the LPA.

[6] Daniels v Complaints Committee No. 2 of the Wellington District Law Society, High Court Wellington, CIV 2011-485-000227 [8 August 2011] Gendall, MacKenzie, Miller JJ

Costs

[33] In addition to the legal costs incurred by the Society to prosecute this matter, of some $19,895, the Standards Committee seeks a contribution to the investigation costs of the inspectorate of the New Zealand Law Society, namely $23,635. In addition to this fee s.257 costs of the Tribunal are sought to be reimbursed to the New Zealand Law Society. These costs are in the order of $6,000. However because some of the charges involve the LPA to which s.257 does not apply we have adopted the practice of discounting the s.257 costs to reflect that. Thus we order a s.257 payment from the New Zealand Law Society of $3000.

[34] We take account of the huge financial cost which the practitioner has already faced in the loss of his practice, the reduction of his income and he is going to have to sell properties in order to pay the costs which will be ordered. The Law Society has indicated that they will negotiate to achieve suitable arrangements for payment by the practitioner upon an order of costs being made. Thus, we order an award of costs in favour of the Standards Committee in the sum of $25,000 to reflect legal costs and inspection costs. We make a further order pursuant to s.249 of the LCA that the practitioner reimburse to the Law Society the s.257 award in respect of Tribunal costs in the sum of $3000.

Summary of Orders

(1) The practitioner's name is struck off the Roll of Barristers and Solicitors

(2) Costs in favour of the Standards Committee of the New Zealand Law Society in the sum of $25,000, s.249 LCA and s.112 LPA.

(3) An order pursuant to s.257 against the New Zealand Law Society for payment of the Tribunal's costs in the sum of $3000.

(4) An order pursuant to s.249 of the LCA that the practitioner reimburse the New Zealand Law Society in respect of the s.257 costs in the sum of $3000.

DATED at AUCKLAND this 23rd day of December 2011

Judge D F Clarkson
Chair