NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 40

LCDT 008/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 5** Applicant
AND	**GREGORY BRYDEN CLARKE** Of Dargaville Barrister and Solicitor

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Clarke

Mr S Grieve QC

Mr C Lucas

Mr W Smith

HEARING at Auckland District Court

DATE OF HEARING 22 August 2013

APPEARANCES

Ms Z Johnston for the Auckland Standards Committee No. 5

Mr Clarke in Person

PENALTY DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] At the conclusion of this hearing the Tribunal announced orders striking the practitioner off the roll of Barristers and Solicitors and making orders as to costs. We reserved the reasons for that decision to be delivered in writing. These are those reasons.

Charges and Background

[2] The practitioner admitted one charge of disgraceful or dishonourable conduct and further admitted wilfully recklessly contravening provisions of the Lawyers and Conveyancers Act and Subsidiary Rules as follows:

> (i) Section 4(c) (requirement to act in accordance with all fiduciary duties and duties of care owed by lawyers to their client(s); and/or
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> (ii) Rule 3 (requirement to act competently and in a timely manner consistent with the terms of a retainer and the duty to take reasonable care); and/or
>
> (iii) Rule 11.1 (requirement not to engage in misleading or deceptive conduct or conduct likely to mislead or deceive).

[3] The factual background is as set out in the charges and requires no elaboration. It is reproduced as follows:

> "**Background**
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> 1 At all material times Mr Clarke held a practising certificate as a barrister and solicitor issued under the Lawyers and Conveyancers Act 2006.
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> 2 At all material times Mr Clarke was a principal in the firm Pegg Ayton Gordon of Dargarville.
>
> **Mr Clarke instructed by Mr T**
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> 3 In July 2011 the complainant Mr T instructed Mr Clarke to advise him in relation to a dispute over a campervan.
>
> 4 The dispute related to a campervan owned by Mr T and his wife which had been provided to a Mr S in connection with a property transaction

between the same parties that ultimately failed to settle. Mr T considered that Mr S owed him $13,500 in respect of the campervan.

5 An agreement recorded that the campervan was to be in part payment of $13,500 in relation to the purchase of a property from vendor Mr S.

6 Mr S took possession of the campervan. The property transaction was not completed. The vendor neither paid for nor returned the campervan.

Disputes Tribunal proceeding

7 On 3 November 2011 Mr T instructed Mr Clarke to lodge a claim in the Disputes Tribunal. He signed a Claim Form dated 25 October 2011 and paid Mr Clarke the $120.80 fee for lodging a claim.

8 Mr T phoned Mr Clarke several times enquiring about the matter's progress.

9 On 2 February 2012 Mr T again phoned Mr Clarke about the claim's progress. Mr Clarke told Mr T that a hearing had been set for 6 March 2012.

10 Mr Clarke made an appointment for Mr T to see him on 2 March to collect documentation to take to the Tribunal. He made a further appointment for Mr T to come to his office at 9.30 am on 6 March before he went to the hearing.

11 At the 6 March 2012 appointment, Mr Clarke told Mr T that he had received a phone call from Mr S at about 5.00 pm the previous evening. Mr Clarke told Mr T that Mr S was unaware of the proceedings and another date would need to be set.

12 Mr T phoned the Disputes Tribunal on 7 March 2012. He was told that the Disputes Tribunal had no record of an application having been lodged in his name, and there was no hearing set for 6 March.

13 Mr T then phoned Mr S who told him that he had not heard from Mr Clarke since October 2011.

Apology by Mr Clarke

14 Mr T made an appointment to see Mr Clarke. He asked Mr Clarke if he had lodged his application to the Disputes Tribunal. Mr Clarke answered "No".

15 Mr Clarke apologised and said that he had "stuffed up badly".

16 Mr Clarke later refunded Mr T for the Disputes Tribunal fee of $120.80, plus $50 as compensation for travel expenses.

17 On 12 March 2012 Mr Clarke phoned Mr T and asked to see him. Mr T went to see Mr Clarke on 13 March. Mr Clarke was apologetic and said

he had no explanation for his conduct. He offered to do any further work for free.

18 Mr T made a complaint to the New Zealand Law Society dated 13 March 2012.

19 Mr T advised the Lawyers Complaint Service by letter of 24 August 2012 that the Disputes Tribunal hearing took place on 20 August 2012.

20 Mr T was surprised to receive emails at the hearing sent by Mr Clarke to Mr S discussing the matter without reaching final agreement on the amount to be paid for the campervan."

[4] The practitioner speedily admitted both the charges and the supporting particulars and effectively placed himself in the Tribunal's hands as to penalty. He recognised that at the very least a lengthy suspension would be imposed but that he was at serious risk of strike off.

Previous disciplinary findings

[5] Unfortunately this case must be viewed in conjunction with the previous conduct of the practitioner as has emerged from the two previous findings of misconduct against him in 2001 and 2007 respectively.

[6] In 2001 the practitioner admitted three charges of misconduct in his professional capacity which were of a very similar nature to the current situation and involved his lying to his client and thus abusing the practitioner/client relationship of trust and confidence. The Tribunal found Mr Clarke to have *"... lied and ... obfuscated on repeated occasions, in a consecutive pattern over a relatively protracted period*". Mr Clarke was told to consider himself on probation at that point.

[7] However, in 2007 he faced yet further charges alleging:[1]

(i) Failed to hold funds exclusively for a client.

(ii) Made or caused to be made false entries in trust account records to conceal misappropriation; and

(iii) Caused a trust account receipt to be issued showing that funds were refunded and this was untrue.

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[1] As set out in the submissions for the Standards Committee.

[8] This offending related to a vulnerable client namely an estate from which funds were taken to cover an error made by the practitioner. There was no personal benefit to him and the funds were repaid and furthermore, as in the first matter, he admitted the offending promptly.

[9] The penalty imposed on the 2007 misconduct was a three-month suspension. At the conclusion of its decision the Tribunal had this to say:

> "Mr Clarke, you have heard the clang of the prison door now. Be assured that next time - if there is a next time - it is not a short term, it's for life. You cannot afford a next time."

[10] Sadly, for the practitioner, the matter before us is that next time. It is a matter which of itself would not have attracted such a serious response. However because of the previous conduct of the practitioner a much more serious response is required from the Tribunal having regard to its clear obligations to protect the public.

Submissions of the Standards Committee

[11] It was submitted by Ms Johnston that the current charges involve, once again, deliberate dishonesty to a client. It was in this context that, considered together with the previous offending, the Standards Committee sought an order striking the practitioner from the roll of Barristers and Solicitors.

[12] It was submitted by Ms Johnston that because of this history, the practitioner could not be regarded as a fit and proper person to practice law. Thus an order striking him from the roll of Barristers and Solicitors was sought.

[13] Ms Johnston went on to refer us to the Statutory Purposes in disciplinary proceedings, namely the protection of the public and maintenance of professional standards.[2] We were then referred to the now familiar portions of the decisions in *Dorbu*[3] as endorsed in *Hart*:[4]

> "[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer.

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[2] *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825 at [36].
[3] *Dorbu v New Zealand Law Society* [2012] NZAR 481 (High Court, Miller, Andrews, Peters JJ) at [35].
[4] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83 (Winklemann and Lang JJ).

> Determination of that issue will always be a matter of assessment having regard to several factors.
>
> [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
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> [187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.
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> [188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.
>
> **[189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.** (Emphasis added)."

[14] Although it was acknowledged that the practitioner admitted his conduct and fully cooperated with the disciplinary process from the outset it was submitted that overall his conduct had to be viewed as demonstrating that he was not a fit and proper person. It was submitted that the protection of the public required that he be struck off.

[15] The Standards Committee went on to seek a sum of compensation for stress suffered by the client.

The Practitioner's position

[16] The practitioner answered questions posed by the Tribunal relating to how he had found himself in the position where he had once again let a client down so badly. The Tribunal also sought information from him about his personal circumstances. The practitioner does not own any significant property other than his practice and

acknowledged that he had been burying his head in the sand about these proceedings, despite having indicated in a telephone conference some two months prior to the hearing that he would attempt to dispose of his practice. He has not done so.

[17] The practitioner largely left his fate to the Tribunal and it seemed to be his preference that the matter simply be taken out of his hands.

Decision

[18] We consider it most unfortunate that a practitioner, after many years of practice, ought to find himself facing the end of his career for what had begun as such a minor oversight or failure. He simply failed to post a form to the Disputes Tribunal. Unfortunately, instead of acknowledging that, he offended in a much more serious way, by lying to his client as he had done to previous clients and thus compounded the seriousness of the situation. This occurred after he had clearly been put on notice only a few years ago that he could not afford to behave in this manner again.

[19] We carefully considered whether a lengthy suspension might be sufficient to meet the purposes of the Act. We noted that this practitioner has been down the path of suspension before and that did not seem to have made any difference to his behaviour. We took the view having considered the matter carefully, that there was no lesser intervention which would protect the public sufficiently. We bore in mind the dicta in *Daniels*[5]*:*

> [22] ...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 response ...

[20] In the end we had no confidence that Mr Clarke was able to mend his ways and behave in a manner which would ensure that he properly served the public, in a profession in which the public must be able to have complete and utter trust in a lawyer.

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[5] *Daniels v Complaints Committee 2 Wellington District Law Society* [2011] NZLR 85 (Gendall, MacKenzie and Miller JJ).

[21] In relation to compensation sought, although the lawyer's actions were clearly reprehensible and the client was badly let down, we did not consider this was the sort of unusual situation where compensation for emotional distress could be contemplated.

[22] In relation to costs we consider that the practitioner had signalled at a very early stage his acceptance of all of the details of the complaint and the Standards Committee process and we consider that in those circumstances the costs appeared to be somewhat high. We also took into account the practitioner's personal circumstances.

Orders

1. There is an order striking the practitioner off the roll (s 242(1)(c)).

2. There is an order of costs against the practitioner in favour of the Standards Committee in the sum of $8250 pursuant to s 249.

3. There is an order that the Tribunal costs, payable under s 257, in the sum of $1465 to be paid by the New Zealand Law Society.

4. There is an order pursuant to s 249 that the practitioner reimburse the New Zealand Law Society for the s 257 costs.

DATED at AUCKLAND this 10th day of September 2013

Judge D F Clarkson
Chair