NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 40
LCDT 024/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 1** Applicant
AND	**CHRISTOPHER GIDDENS** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Clarke
Mr C Lucas
Ms C Rowe
Mr I Williams

HEARING in the Specialist Courts and Tribunals Centre at Auckland

DATE OF HEARING 12 June 2014

COUNSEL

Mr M J Hodge for the Auckland Standards Committee
No appearance for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This decision records the outcome of a penalty hearing in relation to one charge faced by the practitioner.

[2] The charge was filed on 4 September 2013 and was admitted by the practitioner in his response dated 30 September 2013.

[3] The practitioner resides in Australia and during a telephone conference various means of ensuring his participation in the hearing were canvassed. In the end the practitioner was directed to file written submissions "to cover the circumstances of the offending and a full statement of his financial and personal circumstances". Following this a one hour penalty hearing was to be scheduled in February 2014 where, it was suggested that Mr Giddens could appear by video conference. In the event, it transpired that Mr Giddens was returning to New Zealand for a visit and the hearing was delayed until June in order to provide an opportunity for him to attend in person. The hearing was allocated for Thursday 12 June commencing at 2.00 pm. At 12.05 pm the Tribunal case officer received an email from Mr Giddens which read as follows:

> "… For reasons beyond my control I am unable to attend the hearing today. I have had a family emergency. I am here until 18 June if the matter can be rescheduled during this time. I apologise for the late notice but I am having to assist family …"

[4] The case officer promptly responded to Mr Giddens requesting a telephone number for his urgent contact and informing him that full details and supporting information would be required to consider any adjournment request, in particular if there were to be a medical emergency a doctor's certificate would be required. Nothing further was heard from Mr Giddens prior to the commencement of the hearing at 2.00 pm. The adjournment was opposed by Mr Hodge for the Standards Committee on the basis that it was last minute and without any supporting detail. The Tribunal refused the adjournment and proceeded with the penalty hearing.

Background

[5] The charge itself was laid in the alternative, namely as:

> "(1) Misconduct under s.7(1)(a)(i) and/or (ii) of the Lawyers and Conveyancers Act 2006 ("Act").
>
> (2) Alternatively, negligence or incompetence in his professional capacity under s.241(c) of the Act.
>
> (3) Alternatively, unsatisfactory conduct under s.12(a) of the Act."

[6] The charge arises out of the breach of an undertaking by the practitioner in relation to the holding of $50,000 from the proceeds of sale from a property by an estate for whom Mr Giddens acted and in respect of which he was one of the trustees. The undertaking was in favour of the X Bank who were releasing a security over the property to complete the sale. It was intended to be used to rectify an access problem over an adjacent property, over which the bank also held security.

[7] The undertaking was provided on behalf of Mr Giddens by his attorney, during his absence overseas. The undertaking stated:

> "I undertake that the $50,000 will be held in Christopher Giddens Tristram Law Centre Trust Account for access and services to X Road, Raglan and that these funds will not be disbursed without the consent of the X Bank and that copies of invoices for work completed will be submitted to the Bank for approval."

[8] Evidence was given by Ms Louth the practitioner's legal executive that leading up to the settlements she had contacted Mr Giddens to inform him what was agreed between the bank and solicitors for the estate. On Mr Giddens' instructions she asked Mr Brook, the attorney, to sign on Mr Giddens behalf. The funds were then held in trust.

[9] Ms Louth's further evidence was to the effect that she drew the undertaking to Mr Giddens' attention on his return from overseas. The balance of the $50,000 was paid into the trust account of the estate. However in September 2008 Mr Giddens asked her to arrange for $10,000 to be transferred from the "driveway" fund held for his fees. Ms Louth reminded Mr Giddens of the undertaking at that point but the fees

were deducted notwithstanding this. She also confirmed that another staff member had drawn the undertaking to Mr Giddens' attention.

[10] Over the course of the next few months almost $40,000 of the $50,000 required to be held was paid to the practitioner on account of his fees. The practitioner did not challenge the evidence of Ms Louth. In his formal Response to the charges however, he stated that the funds had been taken by way of "an oversight".

[11] The only fees invoice in respect of this $40,000 appears to be one for $2,500.

[12] The practitioner did not seek to cross-examine any of the witnesses called on behalf of the Standards Committee indeed he has, in his Response, admitted the charge.

[13] The final piece of evidence which completes the background detail was provided by Mr Scotter, a Hamilton lawyer who was involved with litigation concerning the estate. He provided a copy of an email from Mr Giddens which instructed Ms Louth to take the $10,000, as stated in her evidence. The email states that the $10,000 is to come:

> "… From the funds we are holding for banks and transfer it to the office account. I am fed up with waiting for this matter to be resolved so I can be paid.
>
> You should be able to get the bank to be able to put the wages through for today and tomorrow."

[14] This email was particularly telling concerning the practitioner's state of mind and whether he could possibly, in the face of this, credibly maintain that the withdrawal of funds from this account for his benefit was in any way an oversight.

[15] It clearly was not and what is also apparent from this email is that the practitioner's practice was in a fairly difficult state financially and the funds were required in order to pay wages.

Penalty sought by Standards Committee

[16] The Standards Committee's submission was that in these circumstances to properly reflect the conduct the practitioner must be struck off the Roll of Barristers and Solicitors. Mr Hodge referred the Tribunal to previous decisions which had involved breach of undertakings, firstly to establish that the offence of misconduct had been committed rather than the negligence or unsatisfactory conduct alternatives. In particular we were referred to the dicta of the Court of Appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society,*[1] where at paragraph 47 the importance of undertaking was reaffirmed by the Court.

[17] At paragraph 48 the Court said:

> "There may be cases where a breach of an undertaking may not warrant some form of disciplinary action, but such cases are likely to be rare. Usually, disciplinary action will be justified at a level appropriate to the circumstances. A deliberate breach or one involving gross carelessness may justify a charge of professional misconduct under s.112(1)(a) of the 1982 Act or its equivalent under s.241(a) of the 2006 Act. … Other cases involving negligence to a lesser degree of seriousness may warrant a different charge such as that under s.112(1)(c) or its equivalent under s.241(c) of the 2006 Act. We emphasise, however, that there are no hard and fast rules and that the discretion vested in the Standards Committee to decide what action (if any) to take is to be exercised flexibly as appropriate for the circumstances."

And later:

> "[52]We consider that members of the public would be likely to view a breach of a lawyer's undertaking as tending to bring the profession into disrepute irrespective of whether it was given voluntarily and without personal gain to the lawyer."

[18] In another decision, *Andersen,*[2] in which a practitioner had pleaded guilty to eight charges, including breach of an undertaking (with aggravating further circumstances relating to the offending), the Tribunal imposed the ultimate penalty of strike off.

[19] In contrast, in the *W* decision[3] the undertaking had been given gratuitously and held no personal gain for the practitioner and it was accepted that the breach arose

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[1] [2012] NZCA 401.
[2] *Auckland Standards Committee v Andersen* [2012] NZLCDT 17.
[3] See note 1.

from an honest mistake. The Standards Committee did not seek either suspension or strike-off, as a result of the finding of negligence of *W.*

[20] In this matter misconduct is pleaded as either disgraceful or dishonourable (as regarded by lawyers of good standing); or wilful or reckless contravention of the Practise Rules. In this case the relevant rule is set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008) (Client Care Rules) as follows:

> **Undertakings**
>
> "10.3 A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practise.
>
> 10.3.1 This rule applies whether the undertaking is given by the lawyer personally or by any other member of the lawyer's practice. This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that lawyer is not personally responsible for its performance.
>
> 10.3.2 A lawyer who receives funds on terms requiring the lawyer to hold the funds in a trust account as a stakeholder must adhere strictly to those terms and disburse the funds only in accordance with them."

[21] In this instance there was a clear undertaking which, had a clear purpose and we accept the submission of the Standards Committee that it is plainly disgraceful and dishonourable for the practitioner to ignore the undertaking and pay the bulk of the funds to himself.

[22] It is axiomatic that banks must be able to rely on solicitor's undertakings as inviolate. Mr Giddens' behaviour in this matter may well have seriously undermined the confidence of the bank with which he was dealing, and fellow practitioners, in the sanctity of such undertakings.

[23] If we are wrong that this is disgraceful or dishonourable, the alternate limb of misconduct is established by the flagrant flouting of Rule 10.3. Thus misconduct would be also established under subparagraph 71(a)(ii).

[24] We reject the practitioner's explanation, which has not even been provided on oath, that the payments out were as a result of an oversight. The evidence of Ms

Louth and the email trail clearly establishes to the contrary on the balance of probabilities as required having regard to the seriousness of the allegation.

Tribunal's reasoning as to penalty

[25] The starting point is the gravity of the offending, in this case misconduct.[4] We consider the deliberate or wilfully blind flouting of an undertaking and payment of funds held, for personal gain, to be a particularly serious form of misconduct.

[26] The *Hart* decision then directs the Tribunal to consider the practitioner's disciplinary history. We note that there have been two previous findings against this practitioner, one of negligence or incompetence which involved a contravention of the Solicitors Trust Account Rules.

[27] The second charge related to the overdrawing of his trust account by almost $30,000.

[28] In addition to that, and although not subject to a charge, the practitioner was found to have provided inadequate supervision of staff resulting in an overdrawn trust account of $820,000 (as a result of a fraud committed by a client). We note that the material provided by the Standards Committee demonstrates that the practitioner's trust account was overdrawn at the time of the current offending by over $800,000 for a period of two months. We regard this as an aggravating feature of this offending, in that the practitioner's attention to his trust account was so poor that this state of affairs could arise and in the midst of which he committed the offending which is the subject of this charge. His practice was clearly in some disarray.

[29] This raises serious concerns as to public safety, as well as bearing on the confidence of the public in the legal profession. These matters are central concerns of the Tribunal when engaging in the process of penalty assessment.

[30] A further aggravating feature in our view is that, as well as acting as solicitor in the transaction giving rise to the complaint he was also a trustee. Thus there was an additional fiduciary relationship which was breached by him when the funds were

[4] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83.

paid out to meet his own fees rather than being retained to undertake the work required to perfect the trust's ownership.

[31] The practitioner has failed to appear or provide written information to contextualise or otherwise explain the offending he has admitted. He has had nine months in which to do so. Thus there can be no mitigating features of this offending taken into account other than the brief financial circumstances outlined by the practitioner in a one-page letter in December 2013. Following the events around this offending he declared bankruptcy but has subsequently been discharged. He indicates that he is in casual employment and thus will have difficulty meeting any costs or orders.

[32] Finally, as well as seeking costs on behalf of the Standards Committee, it was submitted that a compensation order in favour of the X Bank ought to be considered. However Mr Hodge conceded that the bank still has security over property and it is not entirely clear from the evidence before us what actual loss, if any, has been suffered either by the bank or the trust who was the practitioner's client. For these reasons we decline to make an order as to compensation.

[33] Pursuant to s 244 the Tribunal finds unanimously, as a panel of five members that the practitioner is no longer a fit and proper person to be a practitioner.

Orders

(1) Section 242(1)(c) - the practitioner is struck from the roll of Barristers and Solicitors.

(2) Section 249 - costs of $9,685 are awarded in favour of the Standards Committee.

(3) Section 257 costs - are certified at $1,810 and are ordered to be paid by the New Zealand Law Society.

(4) Section 249(b) - the practitioner is ordered to reimburse the New Zealand Law Society for the s 257 costs herein, in full.

DATED at AUCKLAND this 17th day of July 2014

Judge D F Clarkson
Chair