NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 40

LCDT 012/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **NELSON STANDARDS COMMITTEE OF THE NEW ZEALAND LAW SOCIETY**
Applicant

AND **PETER ROBERT DALLISON**
Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms S Gill

Mr M Gough

Mr C Rickit

HEARING at WELLINGTON on 15 December 2011

APPEARANCES

Mr B Brown QC for the Applicant

Mr J Morrison for the Respondent

DECISION OF THE NEW ZEALAND

LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] The practitioner has admitted a charge of professional misconduct supported by four particulars. Each particular was pleaded in an alternative form, other than particular 3. Those admitted and forming the basis for penalty are as follows:

(a) In contravention of Chapter 3.4 and/or Chapter 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules"), he provided to the D's a document headed "*Standard Terms of Engagement and Information for Clients of Peter R Dallison Rules of Conduct and Client Care*" that does not satisfy the requirements of Chapter 3.4(a) of the Rules, in that it states that the "*basis on which fees will be charged will be advised at the first interview*", and so does not advise the basis on which the fees will be charged or when payment of fees is to be made (particular 1(b)).

(b) In contravention of Chapters 5.4.1 and/or 11.1 of the Rules, in an email to the D's dated 1 October 2008 he advised that he acted "*for a client who is a member of one of the IA groups*", and set out a proposal for equity funding by that client to the D's, without disclosing (at the same time did disclose before signing) that the client was Dalpeko and that he and his wife, Mary Roseanne Dallison, were the only directors of, and each held a 50% shareholding in Dalpeko (particular 2(b)). (This information was disclosed in a subsequent letter.)

(c) In contravention of Chapter 5.4.2 of the Rules he acted for the D's in relation to a transaction, namely a loan transaction recorded in a Deed of Acknowledgement of Debt dated 6 October 2008 pursuant to which Dalpeko advanced $140,000.00 to the D's ("the Loan Transaction"), in which he had an interest, as a director of and a shareholder in Dalpeko, and in respect of which the interest of himself and the D's did not correspond in all respects (particular 3).

(d) In contravention of Chapter 5.4.3 of the Rules he, as a director of and a shareholder in Dalpeko, entered into a financial transaction with the D's, namely the Loan Transaction, in respect of which there was a possibility of the relationship of confidence and trust between him and the D's as lawyer and client being compromised (particular 4(a)).

Background

[2] The practitioner was representing Mr and Mrs D in respect of a contract to purchase a business. Mr and Mrs D had found themselves in some difficulty after the finance they had arranged became unavailable, after they had declared the contract unconditional. It is Mr D's unchallenged evidence that he first asked the practitioner to seek an extension of the settlement date to enable them to arrange further finance (or sell their home). Mr D also asked the practitioner what other options were open to them. It is Mr D's evidence that the practitioner dismissed the possibility of an extension as problematic and pointed out that Mr D, as an accountant, ought to understand the consequences of defaulting on a contract. This telephone call had taken place late on a Friday and on the following Monday morning the practitioner telephoned Mr D to indicate that he had a client who was a member of the IA Group that might consider providing funding but more information would be required. Mr D provided a document he had prepared over the weekend as a business profile to support alternative funding. He immediately emailed that to the practitioner.

[3] Approximately two days later the practitioner provided Mr and Mrs D with a funding proposal on behalf of a client who was described as "a member of one of the IA Group (Capital Investors). The funding proposal was in fact a profit share proposal providing for monthly payments of $5000 as an advance of a 50 percent share of the net profits of the business. It was described as "equity funding" which would be revisited at the end of two years and either repaid or rolled over. Mr and Mrs D were aware that the proposal would be, to use their words, "financially debilitating" but accepted it because they felt they had no other options until their other property was sold. They advised the practitioner, who said he would send the documents immediately. These arrived the next day with a covering letter which in its final paragraph revealed that the lender was Dalpeko Holdings Limited ".. the investment vehicle of Peter and Mary Dallison which information I hope you will treat confidentially, as will we".

[4] This was the first occasion on which the client's were advised that the practitioner had an interest in the proposed funding. Mr D's response to that was to telephone the practitioner and ask again for him to seek an extension of the settlement date to allow them to get independent advice given the conflict of interest that Mr D perceived the practitioner had.

[5] It is Mr D's evidence, again unchallenged, that the practitioner said there was no time given that the settlement was to take place only a few days later. The practitioner asked for Mr and Mrs D to have the documents separately witnessed but at no time did he advise them to get independent advice having regard to the very blatant conflict of interest which had arisen.

[6] The practitioner's view of this matter is that at all times his motive was to assist a client who was in real difficulties with finance and apparently had no other sources of finance available to him. The practitioner and his wife in fact arranged a bank loan to enable them to make this advance to Mr and Mrs D. He says that in the course of this he lost sight of the fact that his assistance involved "an unacceptable personal involvement" with his client. He acknowledged that to do so was quite wrong and says that he blames no one but himself.

[7] Unfortunately for all concerned the business was unsuccessful and Mr and Mrs D were unable to keep up the monthly payments to which they had committed. In the end the practitioner was obliged to take proceedings against his former clients to recover the funds. Mr and Mrs D were declared bankrupt and the exercise has also left the practitioner with a $100,000 loss.

[8] Since that time the practitioner has merged his practice with another firm where he says he is subject to "rigorous processes and to a degree of oversight, supervision and collegial support".

[9] For the sake of completeness it should be recorded that the monthly payments as agreed to be paid by Mr and Mrs D to the practitioner's company were referred to as "use of capital" but if calculated as an interest rate was in the region of 43 percent per annum. No proper disclosure was made under the Credit Contracts Act of the interest or finance rates as required.

The Standards Committee position

[10] While acknowledging that penalty was entirely a matter at large for the Tribunal, counsel for the Standards Committee indicated he was instructed to seek neither suspension nor strike off but rather an order pursuant to s.242(1)(g) prohibiting the

practitioner from practising on his own account until authorised by the Disciplinary Tribunal to do so, together with costs.

[11] We found this somewhat surprising given that the Standards Committee also provided the Tribunal with a decision of the New Zealand Practitioners Disciplinary Tribunal of May 2005 in which the practitioner was found guilty of either conduct unbecoming or misconduct. We state it this way because the charge itself refers to "conduct unbecoming" but the supporting particulars say that the said conduct "amounts to misconduct in his professional capacity" and in the course of the decision the Tribunal confirms that they had no hesitation in describing the actions of the practitioner as "most certainly professional misconduct". In any event this was previous serious offending, only 6 years ago.

Approach of the practitioner

[12] The practitioner accepted the recommendation of the Standards Committee and did not in any substantial way oppose the orders sought. Mr Morrison, on behalf of the practitioner, reminded the Tribunal his client had "candidly and promptly acknowledged his wrongdoing". He submitted that in taking the steps that he had to leave sole practice the practitioner had taken positive steps to work in what was described as a more "protected environment".

Discussion of the various aspects of the misconduct

[13] We find the most serious to be the blatant conflict of interest with the practitioner's clients. The practitioner ought to have immediately sent the client's for a second opinion. Although the practitioner protested that his prime motivation was a wish to help his clients we cannot escape the conclusion that there was an opportunistic element of potential self gain in the practitioner's behaviour. The factors which lead us to this view are:

[a] The interest rate being charged of approximately 43 percent.

[b] The practitioner's request to the clients to keep it confidential between them, reinforced by his failure to secure them separate advice.

[c] The practitioner's failure to assist the clients by seeking an extension. We note that the late settlement rate for this transaction was by contrast, 18 percent.

[14] Lower on the scale of misconduct behaviour is the failure to advise the basis for charging of fees. However it is important from the public perspective that there be transparency in such matters and all practitioners must be aware of their obligations in this regard.

[15] While the practitioner sought to justify the harsh terms of the contract by reference to the level of risk undertaken by him and problems over security (which subsequently proved to be correct), we cannot lose sight of the serious consequences to the client. Because of the level of repayments they were unable to keep them up and whilst we accept there may have been many reasons for the failure of their business, the fact is they are now bankrupt.

[16] There are a number of factors about the clients themselves which might be seen to weigh in the practitioner's favour. The male client was an accountant, presumably used to the form of loan documents. He thought he had a very good buy and was keen to proceed with the purchase of the business. Perhaps most importantly both clients were aware of the conflict position before signing the loan agreement with the practitioner's company. However Mr D's evidence is that because the practitioner would not seek an extension as requested when he himself suggested independent legal advice, that there was no time but to accept the offer of the practitioner for the funds required. We note that although the business sales agent had provided other options to the client, it was his solicitor who was telling him he had to proceed.

[17] Furthermore, none of the above factors outweighed the duty of a lawyer to at all times, put the interests of his client first without regard to any factors in conflict with that. This is a fundamental fiduciary duty of all lawyers.

Matters in mitigation

[18] We accept that the practitioner ought to be given credit for engaging counsel and admitting culpability at an early point. However he clung to his approach that he

was just trying to help a client whose 'back was to the wall'. In cross examination when pressed by Tribunal members on more than one occasion concerning his motivation, we considered that he was somewhat evasive.

[19] The practitioner has taken rehabilitative steps by disposing of his practice and working under supervision of a senior practitioner. However this mitigating feature was somewhat diluted because, surprisingly, there was no affidavit from that practitioner in support of his employee, or indeed to describe the level of supervision undertaken. We found that somewhat odd given the penalty being (jointly) sought of 'not to practice on his own account'. We do note that the practitioner has lost $100,000 as a result of the transaction under consideration. While we take this into account in terms of his general circumstances when assessing costs, we cannot have regard to loss which arises directly out of offending, as a matter in mitigation.

Suspension

[20] We refer to the decision of the High Court in *Daniels v Complaints Committee No. 2 of the Wellington District Law Society.*[1] At paragraphs [24] and [25] the full Court had this to say on the topic of suspension:

> [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.
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> [25] It will not always follow that a practitioner by disposing of his practice and undertaking not to practice can avoid or pre-empt an order for suspension. The consideration of whether to suspend or not requires wider consideration of all the circumstances. The real issue is whether this order for suspension was an appropriate and necessary response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also to the other purposes of suspension.

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

[21] We consider that the penalty sought by the Standards Committee is quite inadequate to reflect the seriousness of this matter. Instead we make the following orders:

Orders

(1) There will be an order that the practitioner Peter Robert Dallison be suspended from practice for a period of four months commencing immediately. We note we would entertain an application pursuant to s.248 from his employer.

(2) There is an order pursuant to s.156(1)(b) censuring the practitioner.

(3) There is an order pursuant to s.242(1)(g) that Mr Dallison is not to practice on his own account until permitted by the Tribunal.

(4) There will be an order that Mr Dallison reimburse the Standards Committee in respect of their costs, in the sum of $7500.

(5) There is an order pursuant to s.257 that the New Zealand Law Society pay the costs of the Tribunal in the sum of $5000.

(6) There will be an order pursuant to s.249 that the practitioner refund to the New Zealand Law Society, all of the s.257 costs.

DATED at AUCKLAND this 23rd day of December 2011

Judge D F Clarkson
Chair