REDACTED VERSION

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 46

LCDT 028/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006 (under Part 7 of the Act)
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 5** Applicant
AND	**IAN MELLET** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Ms C Rowe

Mr T Simmonds

Mr W Smith

HEARING At Auckland

DATE OF HEARING 27 and 28 May 2014

APPEARANCES

Mr M Hodge for the Standards Committee

Mr C Pidgeon QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This was a sad and somewhat unusual case in that it was the first time that the defence was advanced that the practitioner, at the time the alleged offending occurred, was suffering from an undiagnosed mental illness, namely bi-polar disorder. This would normally be raised in mitigation of the offending.

[2] At the conclusion of the hearing the Tribunal was in a position to give oral rulings on each of the six charges faced by the practitioner and penalty submissions were also considered. We indicated to the practitioner that we would not be, in these very unusual circumstances, suspending or striking him off, however reserved our reasons both on the substantive issues and on penalty. We also reserved for further consideration the issue of whether an order ought to be made preventing the practitioner practising on his own account.

[3] We awaited further submissions from the parties as to Undertakings to be provided by the practitioner and by Mr Lyon, who has been responsible for the practitioner's trust account and conveyancing transactions as will be described below. In the event, after some weeks, which we acknowledge was a delay occasioned by the illness of Mr Pidgeon QC, we received Undertakings and submissions from both counsel.

[4] This decision records our reasons on the liability issues, as orally provided at the end of the hearing but does not make final orders, because the submissions provided do not address all of the matters at issue in relation to Mr Mellet's future practice. We also consider, from some of the submissions that counsel for Mr Mellet may have misunderstood the Tribunal's finding on liability, the reasons for which were not articulated in the oral ruling, which simply made findings on each charge.

[5] Before fixing penalty we require a supplementary submission from Mr Pidgeon addressing the issues raised by Mr Hodge, for the Standards Committee, in his submissions of 11 July 2014, particularly in section 2, dealing with s 30 of the Lawyers and Conveyancers Act 2006 ("the Act").

Charges and background

[6] Six charges were faced by the practitioner, some in the alternative. The practitioner admitted the vast majority of the background facts and thus there was little testing of this evidence. Further, the practitioner admitted Charges 3 and 4 although at the lower level of the alternatives pleaded. By the conclusion of the evidence, which included evidence from his psychiatrist Dr R Wyness, the practitioner conceded, through his counsel, that Charge 1 had been proved to at least the level of negligence or incompetence as had Charges 5 and 6.

Charge 1

[7] Three alternate charges were pleaded: misconduct, within the meaning of ss 7(1)(a)(i) or (ii) of the Lawyers and Conveyancers Act 2006 ("Act"); alternatively negligence or incompetence in a professional capacity of such a degree or frequency so as to reflect on fitness to practice or as to bring the profession into disrepute (s 241(c)); or alternatively unsatisfactory conduct within the meaning of s 12 of the Act.

[8] The charge arose from the failure of the practitioner to fully retain expenses which he had agreed to set aside in order to meet the fees of a barrister retained by him on behalf of his clients Messrs G & R S.

[9] It had been agreed that the practitioner would set aside $35,000 of his clients' funds held in his trust account in respect of the fees of the barrister. The fees were rendered by the barrister in two stages and the first invoices totalling $15,470 were paid promptly.

[10] However, some months later the practitioner failed to make payment of the remaining invoices, with a total value of $17,280. This was because, during a period when he was seriously unwell in late 2010, his clients although, purporting to

authorise payment to the barrister, at the same time insisted on a repayment to themselves of such a sum that the practitioner would have been left significantly out of pocket for his own fees. He had expended considerable time of his own, and disbursements on the case.

[11] Evidence was given by the practitioner and his wife, who was working in the practice, attempting to assist him whilst he was seriously depressed (on some days unable to get out of bed). They claimed that both of the S brothers harassed him until he repaid them the sum demanded from his trust account. Mrs Mellet described how they would wait outside the practice until they thought Mr Mellet was available and effectively "pounce" on him to bring pressure on him. The medical evidence is to the effect that in his significantly diminished state he would have coped badly with such pressure and been less able to resist it than were he well. This evidence was not strongly challenged by the Standards Committee.

[12] In the end having insufficient funds to pay his own invoices as well as the barrister, who was threatening to make a complaint, the practitioner and his wife went to what they described as a "loan shark" or a third tier lender and borrowed sufficient funds to rectify the matter and ensure the barrister was paid, paying interest at the rate of 27% in order to do so.

[13] More serious were the trust accounting steps taken to cover these difficulties, and these form the subject of Charge 2.

Charge 2

[14] This charge pleads misconduct in terms of s 7(1)(a)(i) and or (ii) and is denied by the practitioner. This charge relates to the allegation that in order to conceal the fact that insufficient funds had been retained by the practitioner, he instructed his trust accountant to enter false receipts in November 2010 of $16,000, December 2010 of $8,000 and another November entry of $50,000 in contravention of Regulations 11 and 12 of the Trust Account Regulations. The actual funds, namely the $50,000, were not received until 31 March 2011 when the funds borrowed, referred to above, were secured by the practitioner.

[15] While, in his evidence, the practitioner denied having issued the instruction to his trust accountant, he did not seek to cross-examine her and her evidence was clear that she acted on his instructions. Furthermore the practitioner accepted in his evidence that the trust accountant was an honest person and further accepted that, during this period of his illness, his recollection may well have been affected.

Charge 3

[16] Three alternatives are pleaded in respect of this charge also. Misconduct pursuant to ss 7(1)(a)(i) and or (ii); or negligence or incompetence pursuant to s 241(b); or unsatisfactory conduct in accordance with s 12. This charge was admitted by the practitioner at least at an 'unsatisfactory conduct' level and relates to his complete failure to respond to requests by the Complaints Service in relation to the matters which were the subject of complaint underlying Charge 1.

[17] During the time that the Complaints Service and indeed later the Standards Committee, attempted to engage the practitioner, namely from late May 2011 until late 2012, the practitioner accepts that the Complaints Service "bent over backwards" to allow him opportunities of responding. Once again, this was during the period of his undiagnosed illness and the practitioner accepts that he was simply not coping with the normal demands of his practice. It is not suggested that the practitioner's actions were oppositional as such, rather, that they fell below the standards required of practitioners to cooperate with their professional body in all disciplinary inquiries.

Charge 4

[18] Once again the charge is pleaded in the three alternatives set out in relation to the previous charges, and relate to Mr Mellet's complete failure to ensure his trust account was properly managed and conducted within the Trust Account Regulations. Between 1 April 2011 and 31 March 2012 he allowed it to become overdrawn for nine of the 12 months and at the same time provided the New Zealand Law Society ("NZLS") with certificates which were misleading because they concealed this state of affairs. The practitioner had lost the services of his trust accountant during the period of his illness and was unable to attend to the accounting role himself, but did nothing to put the matter right until an NZLS investigator was appointed at which stage he re-engaged his trust accountant to bring the records up to date.

[19] In the end, a senior practitioner, Mr Lyons, who was the attorney of the practitioner, stepped in and tidied the entire matter up. After some two weeks of work on the records, Mr Lyons established that in fact no clients were at risk or out of pocket but that the difficulties had arisen from failure of the practitioner to properly invoice in a timely manner and keep the records in order as he was required to do.

[20] Since that time Mr Lyons has had the sole control of the practitioner's trust account and also has the sole ability to carry out LINZ conveyancing transactions, thus ensuring the safety of the public. Mr Lyons became involved in early April 2013 when the practitioner's health deteriorated to the extent that he required a brief respite admission for approximately 10 days.

[21] We were told that the Law Society had considered the step of Intervention into Mr Mellet's practice, pursuant to s 164 of the Act. They did not proceed with this because of Mr Lyon's advice that he was considering amalgamation of the Mellet practice with his own, and then later, that he had done so. We were somewhat alarmed to learn at the hearing that, rather than being treated as an employee, as had been notified, the reality was that Mr Mellet was an independant contractor to Mr Lyon. The undertakings which have since been provided propose that this arrangement continue.

Charge 5

[22] Again three alternatives are pleaded in respect of the conduct which arose out of a complaint by a client that between 2011 and early 2013 the practitioner failed to take proper steps and diligently address the client's presenting problem. The client alleges that this caused him to lose the defended hearing at which the practitioner appeared for him in January 2013. The practitioner denies that the outcome would have been any different even had he attended to matters in a more thorough and punctual manner, however accepts that his communication with, and general service to the client fell below his own standards. His counsel conceded that the behaviour complained of could be categorised as negligence.

Charge 6

[23] Once again three alternatives are pleaded in respect of a further complaint from a client, in respect of whom the practitioner failed to file an information capsule in time, resulting in summary judgment being obtained against the client. To make matters worse the practitioner promised to apply to set aside the judgment at his own cost but in fact did nothing about this. Once again this complaint arises out of a period between July 2012 and October 2012 during a period when we now know that the practitioner was once again seriously depressed and not coping with his work. Once again, in submissions, counsel for the practitioner accepted that his conduct in this matter was negligent and indeed the practitioner himself acknowledged in his evidence that during the times when he was seriously unwell he was not fit to be working.

Psychiatric evidence

[24] Redacted.

[25] Redacted.

[26] Redacted.

[27] Redacted.

[28] Redacted.

[29] Redacted.

[30] Redacted.

[31] Redacted.

[32] Redacted.

[33] Redacted.

[34] Redacted.

[35] He has since the April 2013 admission been fully compliant with mood stabilising medication and has improved in his functioning personally and professionally, enormously as a result. He is now able to see his improvement and stability over the past year and is able to attribute this to his compliance with the treatment regime. He has regular communication with a psychologist and has managed the prescribed medication with few or no side-effects. This medication is able to be monitored by regular blood testing.

[36] Redacted.

[37] Redacted.

Impact of illness upon liability

[38] It was submitted on behalf of the Standards Committee that the existence of the diagnosed medical disorder provided an "explanation rather than an excuse" for the offending. Indeed Mr Mellet himself made the same point in his evidence a number of times.

[39] Furthermore Mr Hodge, on behalf of the Standards Committee, submitted that the evidence from Dr Wyness' was that at no point was the practitioner unable to tell right from wrong, however impaired his judgment might have been. Thus Mr Hodge submitted that in relation to the false entries in the trust account and untrue certificates, even if it were accepted that they were part of an avoidance mechanism related to the practitioner's illness, that did not justify the behaviour.

[40] Mr Hodge submitted that in the case of each of the charges there was very serious behaviour which, in the absence of the mental disorder, might well lead to strike-off of the practitioner.

[41] Mr Hodge referred to the overseas authorities provided by the practitioner in support of his opening submissions and distinguished them from the present case. Counsel asserted that these decisions were based on an agreed outcome and therefore provided no analysis concerning liability, or were cases where the dicta referred to were commenting on penalty rather than liability.

[42] It was submitted that the practitioner ought to have sought help when he found himself out of control.

[43] On behalf of the practitioner Mr Pidgeon QC responded that the practitioner had in fact in the early stages of his difficulties sought help. At one point he had an experienced practitioner come to assist him as a locum and on another occasion sought help from the Law Society Benevolent Fund in order to get his affairs in order. It was submitted that the facts had been essentially admitted and that the practitioner acknowledged there had been times during the period in question when he was unfit to practice. Mr Pidgeon pointed to the frank and honest evidence given by Mr Mellet and submitted that it was difficult to see how his behaviour could be viewed as "dishonourable" given his mental state.

[44] Mr Pidgeon went on to point out that over the past year Mr Mellet has practised competently and had put in place a support structure before it was required by the Law Society or charges brought.

[45] Finally Mr Pidgeon accepted that the Tribunal's task involves protection of the public and that this will bear on the issue of penalty.

Discussion

[46] By way of summary, it will be seen that the Tribunal largely accepted Mr Hodge's submission that the presence of the practitioner's illness cannot provide a complete avoidance of responsibility, although it is extremely relevant in determining proper penalty and protective orders.

[47] We accept the submission that it is the responsibility of any legal practitioner who becomes unwell or is not functioning as he or she knows he ought, to immediately seek help in order to protect his or her clients. This is of course particularly difficult where the illness itself has an element of denial or lack of personal insight, particularly in its early stages.

[48] The one charge where we consider that there ought to be a somewhat modified approach is **Charge 3**. We have in the past found such failure to cooperate with a Standards Committee or Complaints Service request to be misconduct. However in this matter there is an entirely different flavour from that of a practitioner who is deliberately ignoring, in an obstructive or belligerent manner, the directions of his professional body. We consider to some degree at least the practitioner's illness

provides an explanation for his behaviour or at least reduces his culpability to the level of unsatisfactory conduct, in that it consists of contravention of s 147 of the Act, but not to the extent that that could be regarded as a "wilful or reckless contravention" pursuant to s 7 of the Act.

[49] In relation to **Charge 1**, we consider this to be a somewhat unfortunate charge given that the barrister involved was, within a relatively short period, fully paid and by means of a borrowing arrangement which was considerably to the detriment of the practitioner and his family. We would have found this charge to have been at the level of unsatisfactory conduct also, except for the fact that it involves a breach of an undertaking which must at the very least, because of the seriousness of solicitors' undertakings, be held at the level of negligence or incompetence pursuant to s 241. In this finding we rely on the decision in *W.*[1]

[50] In relation to **Charges 2 and 4** we consider that such serious breaches of the important Trust Account Regulations cannot be considered to be at a lower level than misconduct. There cannot be any departure from the high standard of trust accounting and full and frank (voluntary) disclosure, given that this underpins the entire regime for the management of client funds by any lawyer.

[51] In respect of **Charges 5 and 6**, as conceded in closing by Mr Pidgeon, the practitioner's deficits in representing his clients in these two instances must be regarded as negligence despite the enormous difficulty he was labouring under at the time. Once again he had an obligation to tell the client that he was unable to carry out their work while unwell. We consider that the reflection of the difficulties under which the practitioner was labouring must be reflected in penalty rather than liability.

[52] Thus we record, as we announced in our oral decision the following findings on the charges: Charge 1 negligence or incompetence pursuant to s 241 proved; Charge 2, misconduct proved; Charge 3, unsatisfactory conduct proved; Charge 4, misconduct proved; Charges 5 and 6, negligence or incompetence proved.

[1] *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401 at [48] and [50].

Penalty

[53] We reserve our decision on penalty pending consideration of a further submission to be filed by Mr Mellet's counsel, to address the matters referred to in paragraph [5] of this decision.

DATED at AUCKLAND this 25th day of July 2014

Judge D F Clarkson
Chair