**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 47
LCDT 005/13 & 006/13

**IN THE MATTER** of the Lawyers and Conveyancers Act 2006

**BETWEEN** **WELLINGTON STANDARDS COMMITTEES No. 1 & No. 2**

**AND** **GARY EDWARD SAWYER**
Practitioner

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Mr W Chapman
Mr M Gough
Mr S Maling
Ms P Walker

**HEARING** at CHRISTCHURCH on 14 October 2013

**COUNSEL**
Mr G Nation for the Standards Committee
Dr D Webb and Mr R Kay for the Practitioner

**DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

## *Introduction*

[1] Mr Sawyer faced two charges filed by the Standards Committee No. 1 of the Wellington Branch of the New Zealand Law Society and a further charge brought by the Wellington Standards Committee No. 2 of the New Zealand Law Society. The three charges and supporting particulars are attached to this decision as Schedule 1.

[2] The practitioner admitted a misconduct charge brought in relation to the behaviour in 2011 and the further misconduct charge relating to his behaviour in July 2004. He denied the remaining charge on the basis that his admitted negligence was not such as to reflect on his fitness to practice or tend to bring the profession into disrepute. This charge was in relation to his actions in July 2007. The hearing proceeded as a defended hearing in relation to the negligence charge and a penalty hearing as to the two admitted charges or three if there were a finding of the Tribunal adverse to the practitioner in respect of the third charge.

[3] At the conclusion of the hearing, the Tribunal reserved its decision as to all matters.

## *Background*

### 1. July 2004 misconduct

[4] This matter, which has been the subject of considerable litigation (High Court, Court of Appeal and Supreme Court decisions having been delivered) arose when the practitioner represented clients in respect of the sale of a portion of their rural property. In 2001 the property had been subdivided and as part of that subdivision water permits were also divided and transferred.

[5] In July 2004 the practitioner attended upon the clients in respect of the transfer of the property and obtained their signatures on that document but overlooked having the water permit transfers signed at the same time. As it transpired the water permits that had been agreed to be sold were in fact incorrectly described and it was that and the failure to provide all of the water permits in terms of the contract which was the subject of the litigation. However the complication and the misconduct in respect of this practitioner arose because, having discovered his mistake in failing to have his client's signatures endorsed on the transfer of water permits, he decided that rather than admit his error, and in order to save the clients a journey back into town for the purposes of signing, he forged their signatures on the documents.

[6] This was readily acknowledged by Mr Sawyer when it was discovered. It is most unfortunate because in fact Mr Sawyer could have signed as his client's agent and on their behalf. However Mr Sawyer was acting outside his usual area of expertise, which was as a litigator, in representing the clients in this particular transaction.

[7] In due course the firm was sued for negligence, and the Court of Appeal treated the forgery aspect as an aggravating feature of this negligence.

[8] Mr Sawyer admits that it was quite wrong of him to act in this way and that it was misconduct.

[9] Because of the litigation it was decided not to pursue the disciplinary proceedings until that was concluded. Thus not only were the negligence proceedings hanging over the practitioner for something like eight years, so were the disciplinary proceedings which flowed.

[10] That in itself is unfortunate because had the disciplinary proceedings been concluded it may well have led to the practitioner being dealt with in a manner which may have assisted him to be more self-aware in respect of his limitations in areas of practice and may well have avoided the subsequent events which have led to the further disciplinary charges. That of course can only be a matter for speculation and indeed was not raised by the practitioner or suggested that any weight ought to be

put on that factor other than to acknowledge the offending is now some nine years old.

## 2. 2007 misconduct

[11] In 2007 the practitioner represented clients who were personal friends in respect of a proposed sale of a commercial property. Once again this was outside the practitioner's acknowledged area of expertise. The practitioner justifies this by indicating the pressure he was under (partly self-imposed) to generate his share of fees having regard to the fact that most of his work was legally aided family and criminal litigation.

[12] His clients had been approached by a large Australian firm to purchase the land. As a result the client approached the owner of a neighbouring commercial enterprise. The latter was keen to secure the property for themselves and thus made an offer to the client which, after some negotiation, he preferred to the original one.

[13] It should be noted that the client had arrived unexpectedly and consulted Mr Sawyer with an agreement which had been prepared by a real estate agent, who was also a family member of the proposed purchasing enterprise. However the purchaser shown on the agreement was a company unknown to the client, but which had been described to him as the property owning vehicle of the business.

[14] The proposed settlement was to be deferred for some four years and thus the transaction was a somewhat unusual one and carried particular risks. This was recognised by the practitioner to some extent and he redrafted the agreement to provide for a much more significant deposit, and a clause which would allow settlement to be brought on with 12 months notice. However in redrafting he failed to notice that an accruals clause that was in the original contract was not included in the new contract, which had particularly significant GST and tax implications for vendor and purchaser.

[15] The practitioner said that he did a brief online company search at the time the client first consulted him but there is no company search on the file or indeed any follow up about any inquiries made as to the worth of the company itself. This was

conceded to be an essential inquiry, as it so transpired when the matter did not ultimately proceed to settlement. The client arranged a meeting with the purchaser and took the redrafted agreement with him. The practitioner attempted to persuade the client to deal through lawyers rather than directly with the real estate agent and says he was surprised when the redrafted agreement was brought back to him already signed, albeit with some alterations. The practitioner had made a file note to consult one of his partners who was experienced in commercial law, but did not have this opportunity before the agreement was concluded by his client.

[16] Some two years later the client purchased a replacement property in the expectation of settlement in terms of the contract which he had entered into for the sale of his existing property. Unfortunately, by then economic conditions had changed significantly and the purchasing company was unable to complete. This left the client in a significantly disadvantaged position.

[17] The client was also disadvantaged by the omission to provide for accruals in the contract and by other omissions relating to the treatment of GST. The practitioner had wrongly assumed that the property was zero rated because a small portion of it was leased or that if payable, GST would only be payable on the deposit. This unfortunately was an error. The practitioner's attempts to negotiate an inclusion of the accrual clause subsequent to the signing of the agreement were unsuccessful because they had significantly negative financial consequences for the purchaser.

[18] The Standards Committee, called evidence from an expert as to the level of negligence in this matter. He identified a number of deficiencies in the practitioners initial inquiries and attendances including a failure to consider and advise on the need for personal guarantees. It was the view of the expert that the practitioner's failure to obtain or test information on the financial status of the company purchasing was negligent. Had he done so, the practitioner would or should have been alerted to the need to consider whether personal guarantees from the directors or others backing the company should be obtained. Secondly, he failed to obtain accounting advice about the GST issues.

[19] Mr Sawyer concedes that in this respect his actions were negligent, but contends that this level of negligence should not be sufficient to attract disciplinary sanction because it is not so serious as to reflect on his fitness to practice.

**3. 2011 misconduct**

[20] The misconduct in 2011, which is admitted, is the most serious under consideration. In early 2011 the clients referred to above, in relation to the 2007 transaction (in respect of which they had suffered very high losses), approached another solicitor, Mr Radich, to provide them with a second opinion as to whether anything could be done to attempt to rectify the position in which they found themselves. Advice had previously been given by Mr Sawyer's firm that no further recovery could be made from the purchasing company, which had by then gone into liquidation.

[21] Mr Radich provided Mr Sawyer's firm with an authority to obtain the file in order that he could consider the clients' position. Knowing that the clients were personal friends of Mr Sawyer's, Mr Radich proceeded with some caution and did not suggest, at that stage, that they may have any remedies against Mr Sawyer's firm.

[22] On receiving the request for the file Mr Sawyer who was on leave, went into the practice one evening to tidy the file in order that it could be sent to Mr Radich. Mr Sawyer acknowledged that file management had never been his strong point and when he looked at it he was somewhat aghast at the few scribbles which represented his contemporaneous file notes.

[23] He said that he worked himself up into a complete state and whilst he acknowledges he must have known it was wrong at the time, he says he cannot remember exactly what he was thinking as he began to reconstruct the file notes. One of the original notes recorded the letters 'PG'. Mr Sawyer explained that this was a reminder note for him to discuss the contract with one of his commercial conveyancing partners with those initials. Mr Sawyer said he managed to persuade himself, briefly, that this might well have been a reference to him having considered personal guarantees and advised the client accordingly. Therefore he wrote the reconstructed file note to reflect this. He also added comments about accruals

clauses which of course he had not originally advised on. He therefore reconstructed two or three file notes to much lengthier documents and in a form which covered off all of the advice which he ought to have given his client at the time of the transaction.

[24] However in a (possibly self-destructive) slip he dated the file notes 2010 rather than 2007.

[25] On receiving the file Mr Radich noted the file notes, which appeared to cover all of the areas of advice to the client which one would have expected of a competent solicitor. He noted that these did not accord at all with what the client had instructed him had been discussed between he and Mr Sawyer. Mr Radich was about to conclude that the client was likely to acknowledge that his memory could be faulty, which would mean that the client had no right of recourse against Mr Sawyer's firm in relation to this failed transaction. However Mr Radich, who had noted that the paper on these file notes appeared somewhat newer than the rest of the file, then noted the 2010 date. He and his associate discussed the implications of this and said to the clients that they needed some further time to reflect on the contents of the file before advising them.

[26] Mr Radich then made an appointment to speak with the senior partner in the firm in which Mr Sawyer was a partner, about what appeared to have been falsely constructed file notes. Shortly after having met with Mr Radich, Mr Sawyer's partner called him in to discuss the matter and indicated that there had been a partners' meeting (which had excluded him) earlier that day, on the topic. The other partner went on to suggest that there must be some reasonable explanation such as Mr Sawyer merely having tidied file notes which had been in a similar form when first written. Mr Sawyer agreed with this suggestion.

[27] Over the next few days Mr Sawyer found that he could not sleep or eat and that his conscience would not allow him to leave unacknowledged the changes that he had made to the actual file notes. He asked his wife to come to the office and confessed to her and she immediately asked the partner with whom he worked closely in to hear a similar confession from Mr Sawyer, that the file notes were an artificial reconstruction, not merely a tidying of a note of original advice having been given.

[28] The client subsequently issued proceedings against Mr Sawyer's firm. Mr Sawyer, having had the hugely stressful and drawn out eight years litigation in respect of the previous (2004) act of negligence, did not wish to see this happen to his former clients or indeed to himself. He urged the parties to mediate and went further than that, offering $200,000 of his personal funds to ensure that the matter resolved rather than proceeding to a hearing.

[29] This mediation occurred and Mr Radich records that a reasonably satisfactory settlement was entered into. It should be noted however that in a later affidavit from Mr Radich, filed in reply to that of Mr Sawyer, he deposed that the fact that Mr Sawyer had made an admission back in 2011, as to his dishonest behaviour, had never previously been notified to him or his client.

[30] Mr Sawyer acknowledges that this is the most serious misconduct and that it goes to the heart of the relationship of trust between lawyer and client. He accepts that in falsifying the file notes he was potentially depriving his clients of a future remedy against him and his firm.

[31] After this incident Mr Sawyer resigned his position in the firm. He had, because of the effects on him of the 2004 forgery and subsequent litigation, already determined to leave the partnership but had been persuaded to remain for the remainder of the year. Following his confession about the file notes it was arranged that he would complete his term as a partner by the end of the financial year and take whatever unfinished files he had with him when he left, to have a small wind-up practice as a barrister.

[32] Once he had concluded these matters Mr Sawyer ceased work at the beginning of 2012 and spent much of that year reflecting on his behaviour and how someone with his usual levels of integrity and commitment to his work could have acted in such a way. Further than that he sought professional help through counselling and psychological services and he established an ongoing mentoring relationship with a senior member of his church.

***Mr Sawyer's personal circumstances at the time of the offending***

[33] In providing some context for the tribunal, rather than excuse-making, Mr Sawyer was open about the enormous pressure he was under at the time of the 2007 events. These are personal details, which need not all be repeated, but it is clear that around this time his level of work stresses, combined with very difficult family pressures and ongoing commitments in the community, lead to a situation that most people would find almost intolerable. Certainly, he would not have been able to be at his best level of functioning, however, for reasons which he has subsequently explored in some depth, did not recognise this.

[34] It is said that lawyers routinely work under pressures and must be able to handle that. That is true to some extent, and for that pressure they expect commensurate rewards. However, what might perhaps be better emphasised, is that lawyers must be able to recognise when they are stretched beyond normal capacity, and be able to acknowledge it to those with whom they work, or seek help from some other source, such as a senior member of the profession. Not to do so, risks not only the lawyer's health, but, as in this case, the level of service to the client.

[35] The practitioner outlined that his work environment was not conducive to such openness. His earlier negligence, although the subject of litigation for eight years, was never spoken of within the firm. It was against this background, and a pressure relating to fees generation, that he made the very unwise decision to take on work outside the area of his expertise. That decision led to disaster for the client.

**<u>Was the practitioner's negligence or incompetence at the level charged?</u>**

[36] The wording of the charge is:

> "...negligence or incompetence of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute..."

[37] We do not consider the negligence involved was of such a degree as to reflect on Mr Sawyer's overall fitness to practise "*as a barrister or solicitor"*. However, we do consider it is of such a degree as to *"tends to bring the profession into disrepute"* our reasons are as follows.

[38] We consider that it is fundamental that the public have confidence that a lawyer accepting a retainer from a client has the necessary knowledge and skill to carry out the work. The onus is clearly on the lawyer to tell the client if the proposed retainer is outside the lawyer's area of competence. Had Mr Sawyer been within his area of competence, then the company search which he said he obtained during the meeting with his client, would have alerted him to the significantly greater risks than those recognised by him at the time. A competent practitioner would have, according to the expert evidence, made further enquiries about the assets and liabilities of the company and the directors, and would have advised the obtaining of personal guarantees.

[39] The evidence of the client is that he and his wife, while not "*ultra conservative in terms of risk*", are prudent people and had it been suggested that there were risks about the substance of the purchasing company, would have been guided by advice to take further steps, such as seeking personal guarantees.

[40] In a letter provided his clients on the evening of the first consultation, while Mr Sawyer advised the that they "*might be better served"* by having the negotiations through solicitors, there was no further advice or caution to alert the client to any potential problems that might arise in dealing with a company about which they had little information.

[41] Furthermore, the client's evidence is that when the contract was returned to him, retyped by Mr Sawyer's office, he understood that it was complete except for the final purchase price. This is a perfectly rational conclusion for a client to draw in these circumstances.

[42] The overlooking of the omission of the accruals clause by the practitioner was careless, particularly since there were only five special clauses in the agreement and a thorough check would have alerted him to the omission.

[43] We conclude that a reasonable member of the public, aware of all the facts surrounding this particular transaction, would believe that the incompetence shown was of such a degree as to bring the profession into disrepute.

[44] In making our first finding that this incident of clear negligence does not reflect on fitness to practice we were persuaded by other evidence before us that Mr Sawyer is a thoroughly competent lawyer in his area of expertise which is litigation. These matters excepted, there is no suggestion that he is not fit to practise in his usual area of expertise.

***Penalty***

**Submissions for the Standards Committee**

[45] The Standards Committee sought that the practitioner be struck off. While conceding that had the 2004 matter been viewed in isolation, such a penalty would not have been sought, it was submitted that the most recent and most serious misconduct must certainly attract strike-off or a significant period of suspension. We were referred to the leading decisions, *Bolton*[1] where the oft-quoted passage of Sir Thomas Bingham MR:

> "It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness...
>
> ...Lapses from the required standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advance for the solicitor, ordered that he be struck off the roll of solicitors".

[46] We were also referred to the more recent decisions of *Sisson*[2] and *Dorbu*[3] where it was held at [5]:

> "Professional misconduct having been established, the other question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice".

---

[1] *Bolton v The Law Society* [1994] 2 All ER 486, at page 491.
[2] *Sisson v Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349.
[3] *Dorbu v New Zealand Law Society* [2012] NZHC 564.

[47] In *Daniels*[4] of course, the least restrictive intervention was also held to be a proper approach. In the Daniels matters the starting point was also delineated as the "*gravity of the misconduct*"[5] following which a

> "balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner. Obviously, matters of good character, reputation and absence of prior transgressions count in favour of the practitioner. So too would acknowledgment of error, wrong doing and expressions of remorse and contrition. For example, immediate acknowledgment of wrong doing, apology to a complainant, genuine remorse, contrition, and acceptance of responsibility as a proper response to the Law Society Inquiry, can be seen to be substantial mitigating matters and justify lenient penalties....".

[48] The Standards Committee acknowledged that there are significant mitigating factors in this case. They acknowledge these include the practitioner's remorse and shame, his taking of responsibility by contributing $200,000 of his own funds towards the compensation for the client's loss and steps taken to address the personality and psychological features which lead to his misconduct.

[49] Notwithstanding these matters the Standards Committee submitted that strike-off was still necessary and made a number of points to support that view including that the public should be entitled to expect that personal and professional pressures will not lead to dishonesty in a lawyer.

[50] The next point of note is that the acknowledgment and consequences of Mr Sawyer's dishonesty in forging his clients' signatures in 2004 did not appear to have deterred him from resorting, in a more serious way, to dishonesty again in 2011. Further it was pointed out that not only were the false file notes created but initially an incorrect explanation was given, or agreed to by Mr Sawyer until his conscience forced him to fully disclose his actions.

**Submissions for the practitioner**

[51] Firstly in relation to the forged signature charge, it was accepted that this has to be regarded as dishonest, however, a number of factors were said to mitigate that dishonesty:

---

[4] *Daniels v Complaints Committee (2) of the Wellington District Law Society* [2011] 3 NZLR 850(8c).
[5] Supra para 28.

- that it was done with the intention of assisting the client (as well as covering the practitioner's oversight);

- that there was no dishonest intent to deprive anyone;

- that no personal benefit was obtained by Mr Sawyer;

- that it was strongly arguable that he could have added the words "PP" and signed his own signature as his clients' agent which diminished the seriousness of what he had done. Dr Webb submitted on behalf of Mr Sawyer that had the matter been dealt with after it occurred in 2004 it would likely have been dealt with by a modest penalty being imposed.

[52] In relation to the most serious charge, namely the false file notes, it was submitted that this somewhat unsophisticated attempt at rewriting the notes was dishonest and not to be minimised. However, it was also submitted that the surrounding circumstances demonstrated that the conduct was out of character. Further, Dr Webb submitted that no repeat of dishonesty was likely particularly given the steps taken by Mr Sawyer to reflect on his behaviour and seek professional help to address how he came to act in that way and what he can do to change himself and his life to prevent it happening in the future.

[53] We also note the submission that it was Mr Sawyer himself who volunteered the information as to his dishonesty, albeit some days later. Whilst the suggestion is that the conduct was "out of character", it is of utmost concern that on two occasions while under stress, Mr Sawyer resorted to dishonesty. However, we accept that Mr Sawyer has taken proactive steps meeting with two counsellors and a psychologist and in establishing an ongoing mentoring relationship.

[54] In terms of the authorities relating to penalty, we were referred again to *Daniels*[6] in relation to the "least restrictive approach".

---

[6] *Supra para 46.*

[55] Dr Webb also referred us to the decision of *Hart*[7], where the Full Court held the test to be as follows:

> "(a) Is the person, whether by reason by his or her conduct, not a fit and proper person to be a practitioner?
>
> (b) Does the practitioner's conduct, viewed overall, warrant striking-off?
>
> (c) In reaching this decision, the Tribunal must consider the risk of reoffending and the need to maintain the reputation and standards of the legal profession, and also whether a lesser penalty will suffice."

[56] It was emphasised that the dishonesty was not "calculated to personally benefit the practitioner". We must reject that submission on the basis that the lie or deceptive file notes were to attempt to relieve responsibility for the practitioner's actions which had been negligent in relation to his clients.

[57] We were referred to a number of decisions where practitioners have not been struck-off, for example, *Flitcroft*[8] and *Sorensen*[9]. In the former case the young and inexperienced practitioner, to facilitate a transaction forged a partner's signature on a solicitor's certificate to the bank. He had immediately confessed and fully cooperated with the process.

[58] In the latter case, Mr Sorensen had assisted executors and beneficiaries under a Will to dishonestly prefer their own interests to those of other legatees. The strike-off order made by the Tribunal was overturned by the High Court despite the fact that the conduct was dishonest and the practitioner knew he was acting dishonestly. No benefit had accrued to the practitioner who had ultimately accepted his wrong doing and had no prior disciplinary history, and a strong record in the community.

[59] It was pointed out that Mr Sawyer prior to these matters has a clean disciplinary record also. We were referred to the contribution to the community that had been made by Mr Sawyer both through his voluntary work and his willingness to take on difficult cases on legal aid for clients who might otherwise not receive representation. In this regard we were referred by way of comparison to another practitioner who had

---

[7] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [181].
[8] *Taranaki Standards Committee v Flitcroft* [2010] NZLCDT 36.
[9] *Sorensen v New Zealand Law Society,* High Court Auckland, 14 February 2013 CIV-2012-404-5634.

received a dishonesty conviction but was not struck-off rather suspended for three years. That decision was *Canterbury Westland Standards Committee Number 3 v Hemi*[10]. We were referred to paragraph 33 of the Tribunal's decision in that matter:

> "The community as a whole requires lawyers with the willingness to help others regardless of their ability to pay or the type of legal problem faced by them".

[60] There is no doubt as to Mr Sawyer's competence in his specialist areas of youth and mental health advocacy, mediations on behalf of the Family Court and difficult lawyer for children roles. This was supported by a reference from the local Family Court Judge.

[61] We were also referred, in the context of rehabilitation to the Tribunal's decision in *Toner*.[11] In that matter, while employed as a prosecutor, the practitioner had stolen grocery items during her lunch hour. Because of the medical evidence provided on her behalf as to her psychological history, the practitioner was granted a discharge without conviction. However, this must still be regarded as a case where issues of dishonesty were before the Tribunal. This was compounded when, in the course of the hearing, the practitioner withheld information from the Tribunal.

[62] Despite this the Tribunal was, in the end, persuaded that the talents of the practitioner ought not to be wasted, were she able to take proper steps to achieve rehabilitation. The *Toner* decision certainly has parallels when considering the approach to his rehabilitation taken by the practitioner in this matter.

**Decision**

[63] We have already commented on some of the decisions cited, and how they relate to this practitioner and these circumstances. We are mindful of the "least restrictive intervention" principle.

[64] Having regard to the tests set out in the above cases, and having regard to the objects of the Act, the dominant consideration for the Tribunal must be the protection

[10] *Canterbury Westland Standards Committee Number 3 v Hemi* [2013] NZLCDT 23.
[11] *National Standards Committee v Toner* [2013] NZLCDT 38.

of the public. We have reflected for some considerable time as to whether this requires the practitioner to be struck off.

[65] In the end, we find by a very fine margin, that the maximum term of suspension will suffice to express the seriousness of this offending and the disapproval of the profession, while allowing for rehabilitation by the practitioner in the future. We have had regard to the comments in *Daniels*[12] and *Fendall*[13] as to the weight to be given to the practitioner's approach in accepting responsibility and taking concrete steps to express remorse by substantial monetary contribution to the losses of the client.

[66] This last factor was also a weighty consideration in the decision of *Fletcher*[14], in which dishonesty had been found by the Higher Courts, but where significant monetary contribution to reinstate the client tipped the balance away from strike-off.

[67] We also take into account the strong references from persons of high public standing and integrity which have been provided for the practitioner.

[68] We consider that following a further three years of suspension and reflection on his action the practitioner is unlikely to be a risk to the public in future and will be fit to practise should he so choose. We note that the practitioner is currently undertaking secondary teacher training and will pursue that career for the immediate future.

[69] In all of the circumstances the following orders are made:

[12] Supra para 46.
[13] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825.
[14] *Waikato Bay of Plenty 356 Standards Committee v Charles Fletcher* [2013] NZLCDT 16.

**ORDERS:**

[a] Pursuant to section 242(1)(e) and section 244(2)(c) an Order made by a unanimous five person Tribunal that Gary Edward Sawyer be suspended from practice as a barrister and as a barrister and solicitor for a period of 36 months from the date of this Order.

[b] Pursuant to section 242(1)(g) an Order prohibiting Gary Edward Sawyer from practising on his own account whether in partnership or otherwise until authorised by the Disciplinary Tribunal if he chooses to resume practice after expiry of his suspension.

[c] Pursuant to section 156(1)(j) an Order that Gary Edward Sawyer make his practice available for inspections at any time during normal working hours by a member or members of the Branch Council of the New Zealand Law Society for the time being in the area in which he is practising if he chooses to resume practice after expiry of his suspension. This Order shall remain in force for a period of three years from the date that he resumes practice.

[d] Recommends that as a condition of Gary Edward Sawyer being issued a practising certificate if he chooses to resume practice at the expiry of his suspension he provides a written undertaking as a solicitor (still on the Roll) that he will not practise any conveyancing including the specific documentation and settlement of sales and purchase of land, conveyancing transactions and conveyancing work ancillary to litigation. He will confine himself to litigation work and in the event of a former client or a new client asking him to act in respect of a conveyancing transaction he will direct those instructions to another practitioner. He will not accept work or hold himself out as competent in the fields of conveyancing or conveyancing ancillary to litigation without a further Order from the Tribunal.

[e] Costs to be paid by the New Zealand Law Society (“NZLS”) pursuant to s 257 are certified at $5,335.

[f] Costs of $25,797 are to be paid by Gary Edward Sawyer to the Wellington Standards Committee's No. 1 and No. 2.

[g] The s 257 costs are to be reimbursed by Gary Edward Sawyer to the NZLS.

[h] Any details in the evidence on the file or the transcript of the proceedings dealing with matters of a medical or psychological nature are suppressed.

**DATED** at AUCKLAND this 11th day of November 2013

Judge D F Clarkson
Chair

**Schedule 1**

**CHARGES LAID BY STANDARDS COMMITTEE NO. 1 OF THE WELLINGTON BRANCH OF THE NEW ZEALAND LAW SOCIETY**

**CHARGE 1**

The Standards Committee (1) of the Wellington Branch of the New Zealand Law Society charges **GARY EDWARD SAWYER**, of Nelson, Lawyer, under section 112(1)(c) of the Law Practitioners Act 1982 with negligence or incompetence of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute in the course of advising David James Tree Services Limited and its director David Roy James as to the drafting of and then acting on completion of the written agreement for sale and purchase of real estate dated 3 July 2007 whereby the said David James Tree Services Limited sold the property belonging to it at 157 Alabama Road, Blenheim, to Flynn Corporation Limited.

**Particulars**

The particulars of the charge are that:

a. On or about 26 June 2007 Gary Edward Sawyer, then a partner in the Blenheim law firm of Gascoigne Wicks, was consulted by David Roy James on behalf of the company of which he was a director, David James Tree Services Limited, in relation to the proposed sale of the property owned by it at 157 Alabama Road, Blenheim.

b. At that time there were two interested purchasers of the said property, both of whom had made offers, the Bunnings group and the Hawtin family, who owned and operated the Mitre 10 business opposite the said property. The Hawtin family made an offer drafted by David Hawtin, a real estate agent to purchase the said property through a company called Flynn Corporation Limited. David Hawtin was a director of that company.

c. The offer to purchase drafted by David Hawtin contained an accruals clause recording that the purchase price was the fair market value of the said property at the date of the contract and the lowest price agreed upon for the property on the basis of payment in full for the property in cash on the date of the contract.

d. After David Roy James decided to proceed to endeavour to sell the said property to the Hawtin interests Gary Edward Sawyer redrafted an agreement for sale and purchase, omitting any accruals clause and with settlement to occur three years after the date of the agreement. This agreement became the final agreement for sale of the said property for a price of $1,600,000.00 plus GST and was dated 3 July 2007.

e. Gary Edward Sawyer failed to advise David Roy James that, if there was a delay of more than 12 months between the contract becoming unconditional and the date for settlement, the GST became payable by David James Tree Services Limited on the full contract price.

f. Gary Edward Sawyer did not obtain a company search for Flynn Corporation Limited nor made any inquiry as to the financial status of that company or as to the funding requirements that company intended to put in place.

g. Gary Edward Sawyer gave no advice to David Roy James as to the desirability of obtaining personal guarantees or a bank guarantee of the performance of the obligations under the said agreement or a bank letter of comfort, nor advised him as to the risks involved in a contract with a delayed settlement period of three years where the contract price was above fair market value.

h. Flynn Corporation Limited failed to settle its obligations under the said agreement apart from paying a deposit of $250,000.00 and then went into voluntary liquidation with no dividend being paid to creditors.

**CHARGE 2**

The Standards Committee (1) of the Wellington Branch of the New Zealand Law Society charges **GARY EDWARD SAWYER**, of Nelson, Lawyer, under section 241(a) of the Lawyers and Conveyancers Act 2006 of misconduct in that on or about 10 or 11 February 2011 he hand wrote out file notes dated 2 and 3 July 2010 purporting to record an accurate contemporaneous note of discussions he had with and instructions he had obtained from David Roy James when acting for David James Tree Services Limited in the drafting of and then acting on completion of the written agreement for sale and purchase of real estate dated 3 July 2007 whereby the said David James Tree Services Limited sold the property belonging to it at 157 Alabama Road, Blenheim, to Flynn Corporation Limited.

**Particulars**

The particulars of the charge are that:

a. On or about 10 February 2011 David James Tree Services Limited through the Blenheim legal firm of Radich Law instructed Gary Edward Sawyer and his firm Gascoigne Wicks to hand over all files relating to the said agreement dated 3 July 2007 indicating that David Roy James considered he needed to have a second opinion in relation to the problems for the vendor which arose under the said agreement.

b. Before handing over the file relating to the said agreement Gary Edward Sawyer created the two file notes dated 2 and 3 July 2010 which did not match file notes previously made by Gary Edward Sawyer on 2 and 3 July 2007 in relation to the said agreement.

c. The purported file notes of 2 and 3 July 2010 did not accurately record discussions Gary Edward Sawyer had with David Roy James nor instructions Gary Edward Sawyer obtained in the course of acting for the vendor leading up to completion of the said agreement.

d. The purpose of creating the file notes of 2 and 3 July 2010 was to endeavour to thwart a successful claim in negligence being made by David James Tree Services Limited against Gary Edward Sawyer and his firm arising out of their advice leading up to completion of the said agreement.

**CHARGE LAID BY WELLINGTON STANDARDS COMMITTEE NO. 2 OF THE NEW ZEALAND LAW SOCIETY**

**CHARGE 1**

The Standards Committee (2) of the Wellington Branch of the New Zealand Law Society charges that **GARY EDWARD SAWYER**, of Nelson, Lawyer, is guilty, under section 112(1)(a) of the Law Practitioners Act 1982, of misconduct in his professional capacity in that, on or about 28 July 2004, he forged the signatures of his clients David Sefton Moorhouse and Jillian Winstone Moorhouse on three transfers of water permit documents.

**Particulars**

The particulars of the charge are that:

i. At all material times prior to late July 2004, David Sefton Moorhouse and Jillian Winstone Moorhouse ('the Moorhouses') were the owners of a farm property called *Altimarloch* in the Awatere Valley, Marlborough ('the Property'). Attached to the Property were A, B and C water permits.

j. In 2001, the Property was subdivided and a portion of it was sold to McNaught and Walker Limited. As part of this subdivision and sale the Moorhouses transferred half of the A water permits and all of the B water permits attached to the Property to McNaught and Walker Limited.

k. On or about 20 February 2004 the Moorhouses entered into an agreement for the sale and purchase of the Property to Altimarloch Joint Venture Limited ('the Agreement').

l. It was a term of the Agreement that the Moorhouses would transfer to the purchaser all the water permits attached to the Property.

m. On or about 24 July 2004 the solicitors for Altimarloch Joint Venture Limited, Wain & Naysmith, and pursuant to the Agreement, sent a Memorandum of Transfer for the Property to Gary Edward Sawyer for execution by the Moorhouses, together with three Notifications of Transfer of Water Permit documents for the A, B and C water permits originally attached to the Property.

n. On or about 28 July 2004 Gary Edward Sawyer arranged for the Moorhouses to sign the Memorandum of Transfer but omitted to get them to sign the three Notifications of Transfer of Water Permit documents.

o. On or after 28 July 2004, on realising the omission, Gary Edward Sawyer forged the signatures of both David Sefton Moorhouse and Jillian Winstone Moorhouse on the three Notifications of Transfer of Water Permit documents and handed them over on settlement to Wain & Naysmith.

p. Thus, on settlement, the Moorhouses purported to transfer to Altimarloch Joint Venture Limited the half of the original A water permits and all of the B water permits that had attached to the Property, which were permits the Moorhouses no longer owned.