**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 47
LCDT 004/13

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **CANTERBURY WESTLAND STANDARDS COMMITTEE**<br>Applicant |
| **AND** | **CRAIG RONALD HORSLEY**<br>Practitioner |

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Mr J Clarke
Mr S Grieve QC
Ms C Rowe
Mr I Williams

**HEARING** at the Auckland District Court

**DATE OF HEARING** 12 June 2014

**APPEARANCES**
Mr M Hodge for the Standards Committee
Mr J Billington QC for the Practitioner

**DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**
**(RE PENALTY HEARING)**

***Introduction***

[1] The decision of the Tribunal on liability was delivered on 19 March 2014. A penalty hearing was allocated for 4 April however, at the practitioner's request, this was adjourned in order that a psychological assessment might be obtained by him. That adjournment was granted on the condition that the practitioner cease practice by 4 April, since it was accepted that the best outcome which could be expected by the practitioner would involve a period of suspension.

[2] The penalty hearing took place on 12 June 2014.

***Submissions for the Standards Committee***

[3] The Standards Committee submitted that the two charges established against the practitioner (one of which he had admitted) demonstrated his lack of fitness to continue in practice. Counsel also drew attention to the further dishonesty in relation to the disciplinary process.

[4] Mr Hodge drew the Tribunal's attention to the key findings in the substantive decision, which detailed how the practitioner had put his own interests for secrecy of the relationship ahead of those of his client, thus breaching one of the primary lawyer/client duties. Counsel referred the Tribunal to further concerning aspects of the practitioner's behaviour in relation to Charge 1, which culminated in his lack of candour with various people and institutions to whom, as an officer of the Court, he owed a clear duty. We refer in particular to paragraphs [40] to [43] of the Tribunal's decision.

[5] The Tribunal was reminded of its expressed concern as to the length of time it took the practitioner to reach the conclusion that he had difficulty in continuing one of the relationships with his client. We were also referred to the finding that Mr Horsley appeared to be unaware of:

> "… The ramifications for the profession as a whole of publication of his affair with a young client with whom he had previously represented in the Youth Court."

[6] In terms of another decision with a similar fact situation, the Standards Committee referred to the decision in *Daniels.*[1] This is a case where a practitioner was found to have had sexual intercourse with a client in circumstances which represented an abuse of her trust and confidence in the practitioner. He was suspended for the maximum three years.

[7] Mr Hodge summed up, in relation to the first charge, that:

> "At best, the practitioner was utterly indifferent to his professional obligations, and to the fact that his conduct compromised those obligations."

[8] In relation to the second charge of knowingly giving false information to the Standards Committee in the course of its investigation, Mr Hodge pointed out that this had been a written response involving a deliberate choice by the practitioner to mislead, not a spur of the moment (verbal) answer under pressure.

[9] Furthermore, we were reminded that this was followed by a misleading statement to the Tribunal itself, as to when the relationship had started, in the formal Response to the charges.

[10] The practitioner did not provide an accurate picture until he was required to swear an affidavit in August 2013. The investigation had begun in October 2011 and the first specific questions about the intimate relationship were put to Mr Horsley in a letter from the Law Society of 23 November 2011.

[11] Mr Horsley lied to the Society firstly in a statement forwarded to the Society via a Mr B Hesketh, Barrister on 31 October 2011, and secondly, in a full written personal statement of some eight pages on 7 December 2011, which was in response to the 23 November letter. Mr Horsley later retained counsel and was clearly not frank with his counsel because his response dated 11 July 2013 contained the incorrect and misleading date about the commencement of the relationship.

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[1] *Daniels v Complaints Assessment Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

[12] Mr Hodge referred us to a decision of the New South Wales Court of Appeal in *Law Society of New South Wales v McNamara.*[2] In that matter the Court held that the attempt to deceive the Law Society was serious enough, but the attempt to deceive the Statutory Committee (the equivalent of the Tribunal) was even more serious. The Court considered this demonstrated the practitioner was unfit to remain on the roll.

[13] Mr Hodge then referred us to the decisions in *Hart*[3] and *Parlane*[4] respectively, where it was held that failure to comply with lawful requirements of a disciplinary body or cooperate was a serious matter indeed. In *Parlane* it was said:[5]

> "… There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives …"

And at [109]:

> "… The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made even if practitioners consider the complaints are without justification …"

[14] Mr Hodge, relying on these dicta submitted that the present instance of knowingly lying to a professional regulatory body was even more serious than non-compliance with its requirement. He submitted that the misleading statement in the formal response to the Tribunal was an aggravating feature of Charge 2.

[15] In summary, Mr Hodge submitted if strike-off were not seen as a proper response then a lengthy period of suspension "*towards or at the maximum period'* was required.

### *Submissions for the practitioner*

[16] Mr Billington QC placed before the Tribunal a full psychological assessment of his client, a series of character references and testimonials to the practitioner's ability

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[2] (1980) 47 NSWLR 72.
[3] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83.
[4] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* HC Hamilton, CIV-2010-419-1209, 20 December 2010.
[5] At paragraph [108].

as a lawyer and a personal statement from the practitioner as to his view of the contextual background of the offending.

[17] While the psychological assessment was initially obtained, as the Tribunal understood it, to explain what was described as 'totally out of character' offending, it was not able to provide any such explanation. Thus, at the penalty hearing it was relied on as establishing that the practitioner "*… does not suffer from any psychological defects and there would be no risk to the public in his practising in the future.*"

[18] Mr Billington placed some emphasis on the distinguishing features between this case and the *Daniels*[6] case. He pointed out that as at the time when Mr Horsley entered into the relationship with Ms S he regarded her as a "former client", and it was only the events which followed closely on their first evening together, namely her car accident driving home, that propelled him into acting for her again.

[19] Secondly, Mr Billington submitted that at the time the relationship commenced Ms S was not a "vulnerable person" as had been found in the *Daniels* matter.

[20] Finally, Mr Billington also submitted that the significant difference arose out of Mr Daniels, in the course of his defence, having blamed his client, making serious allegations about her and her character. When Mr Billington's attention was drawn to the letter that Mr Horsley wrote to his colleague in the course of handing over representation of Ms S, Mr Billington acknowledged that the Tribunal was, in its decision, rightly critical of that correspondence. As we stated in paragraph [21] of our liability decision, Mr Horsley attempted to deflect the allegations about him having a relationship with Ms S by referring to her as having "significant mental health issues as well as drug and alcohol issues" and accusing her of making false accusations of them having an intimate relationship.

[21] Mr Billington submitted however that on its own Charge 1 would not lead to the level of suspension imposed in *Daniels*.

[6] See footnote 1.

[22] In relation to Charge 2 Mr Billington accepted that the elements of dishonesty would give the Tribunal the most cause for concern and while submitting that it was not excusable, he submitted it was at least understandable.

[23] Mr Billington pointed out that the "line was drawn" when Mr Horsley was required to swear an affidavit, at which point he was not prepared to perpetrate the lies he had already told.

[24] Mr Billington drew the Tribunal's attention to Mr Horsley's practice as an exemplary and diligent practitioner for 30 years. He submitted that his behaviour was entirely out of character and ought not to disqualify him from practice forever. He provided the Tribunal with a schedule of cases where misconduct involving dishonesty had led to suspension rather than strike-off.

[25] Mr Billington pointed out that this was not a serial offender such as had been the case in the *Hart*[7] or *Castles*[8] matters

[26] Mr Billington made reference to the practitioner's personal statement to demonstrate acceptance by the practitioner of his wrongdoing. He confirmed the practitioner accepted the findings in the Tribunal's liability decision "without qualification".

***Discussion***

[27] The purposes of penalty imposition in the context of disciplinary proceedings are well established and articulated in a number of the decisions already referred to (specifically see *Hart, Daniels* and *Parlane*).

[28] There is, in this case, a specific aspect of penalty which bears on the special role of the Tribunal in upholding professional standards, the reputation of the profession, and in protecting the public. That is the aspect of "general deterrence". The objectives of specific and general deterrence are discussed in the decision of

[7] See footnote 3.
[8] [2014] NZLCDT 8.

*Stirling v Legal Services Commissioner,*[9] a decision of the Supreme Court of Victoria, which in turn referred to the decision of *Brott v Legal Services Commissioner*:[10]

> "The concept of general deterrence of others by the punishment of an offender is that an offence is followed by substantial adverse consequences will prevent others from committing the offence. Related to general deterrence is the proposition that in deciding the appropriate penalty the Tribunal may have regard to the effect which its order will have on the understanding, in the profession and amongst the public, of the standard of behaviour required of solicitors."

[29] This decision was also referred to in the decision of *Legal Services Commissioner v Nomekos*[11] where specific deterrence and general deterrence were well explained:

> "[24] Specific deterrence, for example, requires consideration of the likelihood of the practitioner reoffending, whether because of:
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> - A lack of insight into what occurred;
> - A lack of remorse about what occurred;
> - A history of offending conduct as opposed to a one-off explicable departure from otherwise high standards of conduct; or
> - Other matters indicating that a particular sanction is required to deter the practitioner from reoffending or, conversely, that rehabilitation has taken place.
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> [25] General deterrence requires consideration of whether there is a need to signal to other members of the profession that adverse consequences will follow such conduct, and thereby deter them from the same conduct, in the interests of maintaining professional standards and public confidence in the profession."

[30] We accept that the practitioner is well aware of his wrongdoing and does not pose a specific risk to the public in relation to future repetition of this offending.

[31] We do consider that the element of general deterrence in assessing penalty in this matter is a particularly strong one given not only the "dishonourable" findings in respect of Charge 1, but the very serious misconduct contained within Charge 2.

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[9] [2013] VSCA 374.
[10] [2008] VCAT 2399, Judge Ross.
[11] [2014] VCAT 251.

[32] In relation to Charge 2 we also accept the submission for the Standards Committee that the misleading approach initially taken with the Tribunal by the filing of a formal response containing false information is an aggravating feature of the second charge.

[33] As to aggravating features of Charge 1, we reject the submission that Ms S was not a vulnerable person at the time the practitioner began his relationship with her. The evidence is strongly to the contrary. She was 18 years of age, the practitioner over 50. He had represented her from the time she was 16 years of age in the Youth Court. She had experienced homelessness, had undergone periods when she had abused drugs and had poor mental health. All of this was known to Mr Horsley at the time when he commenced this relationship with her. The relevance of these matters is that they cast enormous doubt on this practitioner's judgment.

[34] Having said that we accept the practitioner's assurance in his statement of March 2014 to the Tribunal that he takes full responsibility for his actions.

[35] In terms of mitigating features as to both charges we accept that this is a practitioner who is held in high regard by members of his profession. He has practised for 30 years and senior colleagues have, in references provided to the Tribunal, described the trust they have in him. In addition to having a previously unblemished career he has contributed to his profession in terms of continuing legal education and committee work for the Law Society. He is certainly deserving of credit for all of these matters.

[36] As to his guilty plea on the second charge, he ought to receive some credit for that but it came very late in the piece, on the morning of the first hearing.

[37] The acceptance of responsibility by the practitioner and the mitigating features referred to are just sufficient, in the Tribunal's view, to pull the penalty back from strike-off to the maximum period of suspension.

[38] Although the *Daniels* decision is authority for the proposition that the practitioner's overall conduct can be taken into account in assessing fitness to practice and penalty, we remind ourselves that we ought not to treat Charge 2 as an aggravating feature of Charge 1 or of the overall view of the practitioner. To do so

would be to risk double punishment. The two charges are discrete and although the course of conduct in Charge 2 arose from inquiries as to the conduct in Charge 1, this is not a course of conduct where the facts are so inextricably interwoven that there needs to be a global penalty imposed.

[39] For these reasons we propose to impose penalty on the two charges separately.

***Orders***

1. The practitioner will be suspended from practice as a barrister or solicitor in relation to Charge 1 for a period of two years, that period to run from 4 April 2014, being the date upon which the practitioner voluntarily ceased practise.

2. The practitioner will be suspended from practice as a barrister or solicitor in relation to Charge 2 for a period of three years, to run concurrently with the suspension above.

3. The practitioner is to pay the costs of the Standards Committee in the sum of $32,167.

4. The New Zealand Law Society is to pay the costs of the Tribunal pursuant to s 257, which are certified at $6,834.

5. The practitioner is to reimburse the New Zealand Law Society for the full sum of the s 257 costs.

**DATED** at AUCKLAND this 4th day of August 2014

Judge D F Clarkson
Chair