NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 48
LCDT 011/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **ERROL HAMILTON PARSONS** of Christchurch, Lawyer

CHAIR
Mr D Mackenzie

MEMBERS OF TRIBUNAL
Mr M Gough
Mr A Lamont
Mr S Maling
Mr S Walker

HEARING at CHRISTCHURCH on 23 October 2013

COUNSEL
Mr H van Schreven for the Standards Committee
Mr D Lester, for the respondent

RECORD OF REASONS FOR SUBSTANTIVE FINDING AND RESERVED DECISION ON PENALTY AND COSTS

Introduction

[1] The Tribunal heard three charges against Mr Parsons on 23 October 2013. All of the charges were denied, as set out in the practitioner's regulatory response[1] dated 31 July 2013, and as amplified by his counsel, Mr Lester, at the hearing.

[2] The first charge against Mr Parsons alleged misconduct, arising from disgraceful or dishonourable conduct and/or from a wilful or reckless breach of various statutory and regulatory provisions. This charge arose from Mr Parsons' failure to maintain and operate a trust account, and the giving of inaccurate certificates regarding his obligation to keep records ("the Trust Accounting Charge").

[3] The second charge against Mr Parsons alleged misconduct arising from his failure to cooperate with the Standards Committee in the course of its investigations into his conduct. It was alleged under this charge that he had failed to respond adequately to information requirements from the Standards Committee and the investigator appointed to look into matters ("the Investigation Charge").

[4] The third charge against Mr Parsons alleged misconduct in that he had breached certain statutory and regulatory requirements by using a trust account for personal expenditure, and had also failed to retain fees in his trust account pending the issue of an invoice ("the Trust Account Use Charge").

[5] After considering the evidence and hearing from the parties regarding the charges, the Tribunal retired to consider its decision on the substantive matters. When the hearing reconvened, the Tribunal, exercising its power under r 24 Lawyers and Conveyancers (Disciplinary Tribunal) Regulations 2008 ("the Regulations"), amended the Investigation Charge from misconduct to one of unsatisfactory conduct. It did this by deleting the original introduction to the charge and substituting:

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[1] The practitioner's response to the charges prepared and filed pursuant to r 7 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.

> "The Standards Committee further charges the practitioner with unacceptable conduct, being unprofessional conduct under s 12(b)(ii) Lawyers and Conveyancers Act 2006, in that:"
>
> [The particulars then following in the original charge, set out as (a) and (b) in that charge, remained unchanged]

[6] Having regard to r 24(2) of the Regulations, both counsel confirmed that no adjournment was required as a consequence of that amendment. Accordingly, having made the amendment, the Tribunal then proceeded to deliver its decisions on the charges.

[7] The Trust Accounting Charge, involving an allegation of misconduct, was found to be proven. The evidence showed that Mr Parsons should have operated a trust account in respect of money he received from his clients. The Tribunal was satisfied that there had been wilful and reckless breaches of the applicable statute and regulations.

[8] The Investigation Charge, of unsatisfactory conduct, (amended from a charge of misconduct as noted) was found to be proven. The Tribunal was satisfied that on the evidence Mr Parsons had been less than diligent in his various responses and interactions with the Standards Committee and its investigator. He had not engaged effectively in the investigatory process and had ignored his professional obligation to cooperate in a meaningful way.

[9] The Trust Account Use Charge, also alleging misconduct, was dismissed. This charge had alleged that Mr Parsons used a trust account for personal purposes, and did not retain in that trust account fees paid in advance of the issue of an invoice for the fees. The Tribunal took the view that having found, under the Trust Accounting Charge that Mr Parsons did not in fact have a trust account, this charge, relating to an allegation of misuse of his trust account, should be dismissed.

[10] When delivering its decisions on the charges the Tribunal indicated that it would provide its full reasons in writing, in due course.

[11] After delivering its decisions on the charges at the hearing, the Tribunal certified costs of $6,000 under s 257 Lawyers and Conveyancers Act 2006 ("the

Act"). Following that it then proceeded to hear submissions on penalty and costs. At the conclusion of those submissions it reserved its decision on those matters.

[12] This determination records the Tribunal's findings on the substantive charges, as noted above, sets out more fully its reasons for its decisions on the charges, and delivers its reserved decision on penalty and costs.

The Trust Accounting Charge

[13] Under this charge it was alleged that Mr Parsons had failed to operate a trust account as required. Amounts Mr Parsons had received from clients were not paid into a trust account. The Standards Committee submitted that it was a fundamental and primary obligation that lawyers receiving funds from clients dealt with those funds appropriately, and that involved paying them into a trust account and maintaining records that showed the use and disposition of such funds.

[14] The Standards Committee noted that the provision and proper operation of a trust account was important to the trust and confidence clients needed to have in the profession. As a consequence there were statutory and regulatory obligations applicable to such matters, and they had been disregarded by Mr Parsons, it said.

[15] For Mr Parsons, it was submitted that Mr Parsons operated his practice in a way that obviated the need for a trust account. Mr Parsons relied on the exemption provided by s 112(2)(b)(ii) of the Act, which he said allowed him to take money from clients without paying it into a trust account, because the funds were paid pursuant to an issued invoice for fees and disbursements. In those circumstances, Mr Parsons had considered he had no obligation to maintain a trust account, as it was only funds of that nature that he received from clients. To ensure funds received from clients were paid in respect of invoices issued for fees and disbursements, to allow the claimed exemption to operate, Mr Parsons usually billed his clients on receipt of instructions.

[16] As part of this charge against Mr Parsons, the Standards Committee had suggested that Mr Parsons' billing methodology, billing in advance to facilitate his claimed exemption, was a breach of the duties he owed to his clients,

[17] In response to this allegation of a breach of duty arising from the fact that Mr Parsons continually issued invoices prior to undertaking the legal work on which the invoices were based, it was submitted for Mr Parsons that there was a specific provision in the Act[2] which recognised such a situation. In that case, it was said, establishing practice arrangements to issue invoices in the way Mr Parsons had could not be a breach of any duty owed to a client, because the Act recognised that such a situation could arise. Client money paid to a solicitor to satisfy an invoice for fees and disbursements could never amount to a breach of a fiduciary duty, because s 112(2)(b)(ii) of the Act specifically allowed that such a position may arise, it was submitted.

[18] The Standards Committee noted that there was an attempt by Mr Parsons to establish a proper trust account after investigations into the absence of a trust account had been commenced by the Law Society, but that account did not comply with the various requirements placed on practitioners. In any event, Mr Parsons had not qualified as a trust account supervisor, as required by applicable rules, the Committee said.

[19] The Standards Committee said that Mr Parsons' attempt to take advantage of a limited statutory exemption as the basis for not operating a trust account was misconceived. He did not qualify for any exemption under the provisions of the relevant section, and as a consequence not only was he in breach of his trust account obligations, but his certificates provided to the Law Society regarding that matter were incorrect.

[20] The Standards Committee said that money paid to Mr Parsons by a client, even where the subject of an invoice Mr Parsons had rendered, may still be money that was required to be placed into a trust account. For example, disbursements, to be paid by Mr Parsons on behalf of a client to some third party at some future time should be held in trust pending that payment it submitted, as such amounts fell within the wording of s 110(1) of the Act, which required a trust account to be kept where a practitioner received money "*for, or on behalf of, any person".*

[2] See s 112(2)(b)(iv) Lawyers and Conveyancers Act 2006 as set out in paragraph 29 of this record and determination.

[21] The Committee noted that an effort by Mr Parsons to meet this concern after the issue was first raised by its investigation, by taking cheques from clients made out to the proposed disbursement recipients, did not help Mr Parsons. This was because there remained an obligation[3] to keep proper records of money received or valuable property held, and that had not occurred.

[22] The Standards Committee emphasised that the purpose of a solicitor's trust account obligations was public protection. In particular, the protection of money paid to the solicitor, so that the solicitor was not free to deal with the funds as if they were the solicitor's own funds, and to ensure that such funds did not become available to the solicitor's creditors.

[23] The Committee also noted that where an invoice for fees was raised by a solicitor prior to the work on which the fee was based being performed, money paid in advance for fees in relation to that unperformed work was money that was effectively received in trust by or on behalf of a client. Accordingly it should be subject to the provisions relating to the requirement to pay such amounts into a trust account it said.

[24] The Standards Committee submitted that because such a situation raised issues of breaches of fiduciary duty owed by a lawyer to client, this supported its view that there was a requirement that such payments should be held in a trust account. That would ensure advance fee payments made by a client to a lawyer, before the fees charged had actually been earned, did not disadvantage the client.

[25] One of the difficulties Mr Parsons' approach caused, the Committee said, was the inability to accurately record and track client money paid to him. Despite the best endeavours of the Law Society investigator and Mr Parsons himself over nearly two years since the matter first arose, substantial amounts remain unaccounted for in terms of an accurate reconciliation between client receipts, invoices for fees and disbursements, and use of the funds by Mr Parsons the Committee noted.

[3] Under s 111 Lawyers and Conveyancers Act 2006.

[26] The Standards Committee also made the point that the investigation had revealed the receipt of some funds by Mr Parsons from clients where those funds could not be associated with an issued invoice for fees and disbursements. That meant, it said, that Mr Parsons had an obligation to comply with trust accounting requirements in respect of those funds.

Discussion on first misconduct charge

[27] Every practitioner is well aware that when money is received for or on behalf of a client, in the course of the operation of a legal practice, that money must be paid into a trust account and held in that trust account for the client concerned and subject to the direction of that client. This position is set out in s 110 of the Act.

[28] There is also an obligation on a lawyer to account for such money, as well as other valuable property held for a client[4], and to keep, in respect of such money, trust account records that disclose clearly the position of the money in the trust accounts of the lawyer concerned[5]. In respect of other valuable property held, records must describe the property received or held, show when it was received, and detail matters regarding its disposal where applicable. These records relating to money in trust account and valuable property received must be kept in a way that enables convenient and proper auditing or inspection[6].

[29] There are some exemptions to these requirements to keep records of trust accounts and valuable property required by s 112(1) of the Act. These are set out in s 112(2) which states:

> "Subsection (1) does not apply to a person (being a practitioner, related person or entity, or incorporated firm) –
>
> (a) who does not provide regulated services: or,
>
> (b) who, in the course of providing regulated services, does not, on that person's own behalf or in his or her capacity as a director or shareholder of an incorporated firm, do any of the following:

[4] Above, n 3.
[5] Section 112 Lawyers and Conveyancers Act 2006.
[6] Ibid, s 112(1).

(i) receive or hold money or other valuable property in trust for any other person:

(ii) invest money for any other person:

(iii) have a trust account:

(iv) receive fees or disbursements in advance of an invoice being issued."

[30] It was suggested for the practitioner that he was entitled to the exemption provided by s.112(2)(b), as he did not undertake any of the activities noted in that subsection. In particular, it was noted for Mr Parsons that the fees or disbursements he received from clients were received pursuant to an invoice for fees and disbursements that he had issued to the client concerned, as exempted by s. 112(2)(b)(iv). It was accepted that on occasions legal work may still have remained to be completed after the issue of the invoice for that work, and that disbursements included in the invoice may have been due for payment at some date after the invoice was issued.

[31] The evidence showed that Mr Parsons did receive some fees and disbursements in advance of the issue of an invoice for such fees and disbursements. These amounts were identified and referred to in the affidavit provided by the Law Society inspector.[7]

[32] The amounts listed as being received from such clients in advance of invoice showed that in most cases an invoice for those amounts followed shortly thereafter, with periods ranging from a few days to a few weeks after receipt of client money. Nevertheless, it meant that Mr Parsons could not properly say that he did not receive fees and disbursements from clients prior to issuing the relevant invoice.

[33] The way invoices were issued by Mr Parsons, in advance of his work, shows that Mr Parsons has purposely decided to set up his practice arrangements in the way that he considered would entitle him to an exemption from having to maintain a trust account.

[7] Affidavit of Philip Michael Strang dated 6 June 2013, referencing the Standards Committee Bundle at pp 152 -154.

[34] Mr Parsons appeared to consider that if the only money he received from clients was in respect of payments for invoices he had issued (usually for work to be done and disbursements yet to be paid), then he would qualify for the exemption provided by s 112(2) of the Act. He considered that supported his view that he was not obliged to have a trust account.

[35] Even if Mr Parsons had received no money from clients other than in respect of invoices issued (which is not correct as noted at paragraph [31] above), the Tribunal does not consider that s 112(2) provides an exemption from keeping a trust account. Indeed, s 112(2)(b)(iii) applies if a practitioner does not in fact have a trust account, so it could hardly be said to be part of the operative basis for exempting a practitioner from having such an account.

[36] We also note that the key provision on which Mr Parsons said he relied (s 112(2)(b)(iv) of the Act) is not an exemption from the requirement of s 110 to pay money received for or on behalf of any person to a trust account. It is in fact an exemption from the record keeping requirements of s 112(1).

[37] If no trust account is operated by a practitioner, then s 112(2) makes it clear that the various records required under s 112(1) do not have to be kept, provided the practitioner can comply with all the requirements of s 112(2). That is, s 112(2) operates to exempt a practitioner from such record keeping only if a practitioner does not provide regulated services, or, if providing regulated services, the practitioner does not receive money or hold valuable property in trust for any other person, invest money for any other person, operate a trust account, or receive fees or disbursements in advance of an invoice being issued.

[38] For Mr Parsons it was suggested that because he could comply with the provisions of s 112(2) he did not have to operate a trust account. As we have noted, quite apart from the evidence showing that Mr Parsons could not comply with the conditions of s 112(2) of the Act because some amounts were received from clients prior to the issue of an invoice, that subsection did not exempt Mr Parsons from operating a trust account. Operating a trust account is a matter required by s 110, and Mr Parsons would have to show that in the course of his practice he did not receive money for, or on behalf of, any person to avoid the obligation to operate a

trust account. The evidence showed that he could not do that, as he did receive money for or on behalf of a person when he received funds from clients that did not represent the payment of an invoice for fees and disbursements.

[39] We accept that fees or disbursements received in payment of an issued invoice will not normally be money received for, or on behalf of, any person, so that factor on its own would not trigger a trust account requirement under s 110 of the Act. At the time of receipt it is money owed to the practitioner, and it is not received by the practitioner for and on behalf of any person. Similarly, record keeping under s 112(1) is not required simply because fees and disbursements are received in payment of an issued invoice. That is clear from s 112(2)(b)(iv) of the Act.

[40] So far as Mr Parsons is concerned this analysis of the exemption provided by s 112(2) is largely academic, as there was evidence that he received amounts from some clients before an invoice had been issued. Thus he received money for and on behalf of those clients and should have paid it into his trust account. He was not free to ignore s 110 and not operate a trust account in those circumstances.

[41] The Tribunal also wishes to record that even if it had not been the case that some client payments were received prior to invoice, it does not consider that Mr Parsons was free to create a system that attempted to by-pass trust account obligations by billing fees and disbursements in advance. It is one thing to bill clients for work done and disbursements that are to be paid, but another thing completely to always bill clients in advance of work being undertaken, so that it could be said that money has not been received for or on behalf of any person and thus no trust account was required.

[42] It appears that Mr Parsons' billing was undertaken with a view to facilitating Mr Parsons not being obliged to operate a trust account and provide the required transparency and reporting regarding funds received from and held on behalf of clients.

[43] The Standards Committee noted that such billing was likely in many cases to be contrary to a client's interests, putting them at risk if work billed in advance was not subsequently completed or disbursements were not paid on their behalf. It

suggested that setting up such a system of practice breached solicitor-client duties. It was a billing practice based on the practitioner's imperative of avoiding the need for a trust account, rather than reflecting an invoice for value, in respect of services provided. The Tribunal agrees with that submission.

[44] Effectively, Mr Parsons did not operate a trust account because he said he did not receive money for, or on behalf of, any person. The suggestion was that as the money he received was in payment of invoices he had issued for work to be completed and disbursements paid, the money he received was his own, in payment of his invoice. He pointed to s 112(2)(b)(iv) of the Act to justify this approach, saying that it could not be wrong to take such payments direct rather than via a trust account where a specific (reporting) exemption existed in respect of such a situation.

[45] That position does not assist Mr Parsons in respect of the charge of misconduct arising from his failure to keep a trust account, and the various regulatory breaches arising from that, as listed in the charge. It does not assist him, first, because the evidence showed some client payments were received prior to invoice in any event, and second, because in our view a billing scheme cannot be constructed simply to avoid trust account responsibilities. That was the principal reason Mr Parsons took this approach, his position being that he relied (incorrectly, given that it was a record keeping exemption only) on the exemption he considered was created by s 112(2)(b), in particular sub section (iv).

[46] In this charge misconduct was alleged against Mr Parsons on the basis that his conduct would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or, that he had wilfully or recklessly contravened various statutory and regulatory obligations[8].

[47] The first part of the Trust Accounting Charge recites s 7(1)(a)(i) of the Act, which defines misconduct as meaning conduct in the context of the provision of legal services which:

[8] Sections 4, 110, 111, and 112 of the Act, and rr 5, 11, 12, and 16 of the Regulations, and rr 2.5 and 2.6 Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008.

> "…would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable"

[48] This definition reflects the judicial definition of misconduct set out by Viscount Maugham in *Myers v Elman*[9], which effectively required that, to constitute misconduct, the conduct be of a serious nature.

[49] Misconduct has been described more recently as a deliberate departure from accepted standards, or such serious negligence as, although not deliberate, to portray indifference to and an abuse of professional privileges.[10]

[50] Thus, under s 7(1)(a)(i), misconduct is constituted by conduct of a sufficiently serious nature to be viewed as disgraceful or dishonourable, such as where there is a deliberate departure from accepted standards, or negligence portraying indifference.

[51] The second part of this charge against Mr Parsons referred to the contravention of the various sections, regulations, and rules noted. Misconduct is defined under s 7(1)(a)(ii) of the Act as:

> "… a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act…"

[52] That subsection requires a factual examination of what has occurred, and if there is a breach of any of the provisions noted, whether it was wilful or reckless.

[53] Considering Mr Parsons' conduct against these tests for misconduct, we reached the view that he had been wilful or reckless in failing to operate a trust account in the course of his practice and to keep proper records (a breach of ss 110, 111. and 112 of the Act), and in failing to keep trust account records (a breach of rr 11 and 12 of the Regulations).

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[9] *Myers v Elman* [1940] AC 282, at 288.

[10] *Re A (Barrister and Solicitor of Auckland)* [2002] NZAR 452, approving *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197. See also *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

[54] We considered that Mr Parsons had deliberately embarked on a planned course of conduct intended to avoid the need for a trust account. The whole basis of that plan was misconceived and its execution was ineffective. We considered also that in setting up his billing arrangements as he did, with a view to obtaining some trust account exemption, a view that was misconceived, Mr Parsons failed to have regard to the interests of his clients who were paying him money in advance of invoice in some cases, money in advance of work undertaken in most cases, and disbursements prior to their payment to the person to whom they would become due. That these amounts became intermingled with Mr Parsons' own funds put his clients at risk, and that represents a failure to observe fiduciary duties and duties of care as set out in s 4(c) of the Act.

[55] We did not consider that Mr Parsons wilfully or recklessly breached r 5 (designating a trust account and notifying bank), or r 16 (acting as trust account supervisor) of the Regulations. We took that view because there was in fact no trust account to be designated, notified or supervised.

[56] Similarly we do not consider that rules 2.5 and 2.6 of the Rules were wilfully or recklessly breached as a result of annual certificates Mr Parsons gave under r 4 of the Regulations, to the effect that he complied with the conditions of the exemption under s 112(2) of the Act. Rule 2.5 required that Mr Parsons' certificate be correct, and rule 2.6 required that if he found that his certificate was incorrect he must immediately correct that certificate.

[57] Mr Parsons was wrong in certifying that he qualified for the exemption, but it appears from the evidence that he did consider, mistakenly, that he was able to give the certificate correctly. That mistake removes any element of wilful or reckless breach of rule 2.5 in our view. Once he became aware that his certificate might not be correct (as a result of the Law Society investigation) the fact that it may not be correct was already known to the Society, so correction would have been superfluous, particularly where Mr Parsons was defending his position. In those circumstances we do not find Mr Parsons breached rule 2.6 wilfully or recklessly.

[58] In respect of those provisions we have found he has breached, we consider Mr Parsons has shown some indifference to his trust accounting obligations. He

appears to have attempted to construct a practice system that would enable him (in his view) to avoid operating a trust account by rendering bills in advance of work being undertaken, so that client funds he received were received in respect of an issued invoice. That is, he received funds from clients for himself rather than for or on behalf of clients.

[59] We took the view at the conclusion of the hearing that Mr Parsons was guilty of misconduct, certainly under s 7(1)(a)(ii) involving wilful and reckless contravention of the matters noted, and most likely under s 7(1)(a)(i), in that he has gone about setting up a system involving unusual billing practices simply to avoid trust account responsibilities.

[60] In respect of some amounts received from clients, invoices were not issued before payment by the client concerned, so the scheme could not operate effectively in any event, even if permissible. But it was not permissible, as the invoices were created for the principal purpose of attempting to rely on the exemption in s 112(2)(b). We consider that the invoices anticipated by s 112(2)(b)(iv) of the Act are invoices properly issued in the normal course as work is done, not invoices issued prior to work being undertaken with a view (mistaken as we have noted) to qualifying for an exemption that would enable trust account obligations under s 110 to be avoided.

[61] As noted earlier, as a consequence we found this charge of misconduct proven, under both heads, s 7(1)(a)(i) and (ii) of the Act.

The Investigation Charge

[62] This charge was one of unacceptable conduct, which had been amended from misconduct by the Tribunal at the conclusion of the hearing, as noted earlier.

[63] The evidence showed that Mr Parsons had responded to the investigation, and had provided some information when requested, although not as efficiently and accurately as may have been desirable. We accept that the muddled state of his practice records did not assist, and even the inspector appointed by the Law Society

had some considerable task in trying to track money movements in and out of Mr Parsons' bank accounts.

[64] We accept the submission from counsel for Mr Parsons that the issue was really one of degree and adequacy, rather than outright refusal and lack of engagement. In the circumstances Mr Parsons may not have had the ability to provide better information and detail although we record that we do not excuse that, as it was a result largely of his own making. They were his records and it was his approach that had caused the issue.

[65] In the end we reached the view that on the evidence before us regarding his various responses, Mr Parsons was not guilty of conduct which amounted to misconduct in respect of the Investigation Charge. We considered that his conduct in his response to the investigation was unprofessional. Accordingly we amended the charge and found Mr Parsons guilty of unprofessional conduct in his dealings with the Standards Committee investigator, recording a finding of unacceptable conduct against him under s 12(b)(ii) of the Act

Trust Account Use Charge

[66] This charge of misconduct against Mr Parsons was that he had wilfully and recklessly breached statutory and regulatory requirements in that he used a trust account for private and household transactions. It was also alleged that Mr Parsons had debited amounts paid towards fees and did not retain them in his trust account pending the issue of an invoice.

[67] As we found that Mr Parsons was guilty of failing to keep a trust account as required, there was no utility in this third charge. Mr Parsons certainly could not be said to have debited his trust account with personal and household expenses, because the essence of finding the first charge of misconduct proved is that Mr Parsons did not in fact have a trust account when he was obliged to do so. Similarly so far as debiting fees from a trust account without an invoice is concerned. At the conclusion of the hearing the Tribunal dismissed this charge.

Penalty and Costs

[68] Costs were certified at the hearing by the Tribunal, under s 257 of the Act, at $6,000. The Tribunal then received submissions on penalty from the parties.

[69] The Standards Committee submitted that strike off was the appropriate sanction for Mr Parsons. It said this was a gross breach of his professional obligations and that the clients concerned, having regard to the fact that Mr Parsons' practice was basically an immigration practice, were in particularly vulnerable circumstances. This compounded the failure to establish a trust account and to properly report and identify client funds which became intermingled with Mr Parsons' own funds. It also facilitated Mr Parsons' ability to extract payments from clients in advance of work being undertaken, it said.

[70] The Standards Committee submitted that Mr Parsons' inability or unwillingness to address the fundamental issue of money which could not be adequately accounted for as a result of the way he operated his practice, meant that it was reasonable to find that Mr Parsons was not a fit and proper person to be a practitioner.

[71] In respect of costs, the Committee sought its own costs of $12,250 and reimbursement of the Law Society's costs payable to the Crown which the Tribunal had certified at $6,000.

[72] For Mr Parsons it was submitted that suspension was an appropriate sanction. This was on the basis that no client of Mr Parsons was alleged to have lost money, no client had complained, and no dishonesty was asserted. There was a serious practice management issue arising from Mr Parsons' mistaken beliefs regarding his trust account obligations, but that did not require strike-off in all the circumstances.

[73] It was noted for Mr Parsons that he accepted that the position he had adopted regarding trust accounting was untenable, and he accepted that suspension was an appropriate response. This would give him time to reconcile the last of the client payment detail remaining unresolved and undertake the required trust account supervisors course the Law Society had urged him to complete it was said.

[74] At the conclusion of submissions on penalty and costs, the Tribunal reserved its decision on those matters. This determination now sets out the Tribunal's decision on sanction and costs.

[75] In our view this matter does not require that Mr Parson be struck-off. While dishonesty is not a prerequisite to misconduct, or for that matter striking-off[11], we do note that there is no suggestion that Mr Parsons has taken funds dishonestly. All the amounts concerned, so far as can be identified, appear to relate to fees and disbursements he claimed, with invoices being issued for most.

[76] As we have commented, Mr Parsons appears to have been seeking to establish a system aimed at justifying not operating a trust account and performing the obligations associated therewith.

[77] The approach he took, and his mistaken reliance on s 112(2) of the Act, are not acceptable, but we note that no defalcation has been alleged.

[78] In deciding whether Mr Parsons should be struck off we have to consider whether Mr Parsons, by reason of his conduct, is a fit and proper person to be a practitioner[12]. This involves consideration of the nature and gravity of the charge, with dishonesty usually demonstrating that a practitioner is unfit to practise as a lawyer. The manner of response to charges is also relevant, for example co-operation, acknowledgment of error and wrong-doing and acceptance of responsibility. Previous disciplinary history is also a factor in the assessment of fitness to practise.

[79] The Tribunal is also required to consider whether some penalty less than striking-off would suffice[13].

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[11] *Sorensen v New Zealand Law Society (Auckland Standards Committee 2)* [2013] NZHC 1630.
[12] Section 244(1) Lawyers and Conveyancers Act 2006.
[13] The High Court in each of *Daniels v Complaints Committee 2 of Wellington District Law Society* [2011] 3 NZLR 850 at [22]; *Dorbu v New Zealand Law Society* [2012] NZAR 481 at [35]; and, *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83 at [181], referred to the need to consider whether some penalty less than an order to strike off a practitioner's name from the roll of barristers and solicitors would suffice. If a lesser order would suffice, then that lesser order is to be preferred.

[80] When we consider Mr Parsons' proven misconduct and unsatisfactory conduct against the factors affecting our assessment of whether he is a fit and proper person to practise as a lawyer, and having regard to the need to adopt the least restrictive penalty that would suffice, we consider that the public interest can be adequately protected by suspension.

[81] Mr Parsons was wrong to assume he did not have to operate a trust account, and it has resulted in payments from clients being received as Mr Parsons' own funds prior to legal work being completed, and in some cases prior to the relevant invoice being issued. It was a scheme that did not properly recognise duties to clients, and was an artificial and somewhat clumsy attempt to operate a practice system that by-passed trust accounting requirements.

[82] It was not a matter of dishonesty, and Mr Parsons clearly thought that in the particular circumstances of his practice he could operate as he did, something he now understands cannot continue. He accepts a period of suspension is appropriate, and he is undertaking trust account supervisor training and examination as required by the Law Society.

[83] In the circumstances we consider a further period of suspension for 18 months is appropriate, noting that Mr Parsons is currently the subject of an interim suspension order[14].

[84] Mr Parsons is to pay costs as claimed. There was no suggestion from Mr Parsons that he could not meet costs, and it is appropriate that practitioners who embark on behaviour that causes such costs be obliged to pay them, otherwise they become an additional burden on the profession as a whole, which already contributes substantially to the cost of professional regulation.

[14] Mr Parsons was the subject of an interim order for suspension on 21 June 2013, which continues until the charges have been heard and disposed of.

Orders

[85] The Tribunal orders that ERROL HAMILTON PARSONS:

[a] be suspended from practice as a barrister or as a solicitor, or as both, for a period of 18 months from the date of this determination;

[b] pay the Standards Committee $12,250 by way of costs; and,

[c] reimburse the New Zealand Law Society the sum of $6,000 it is to pay the Crown under s 257 of the Act

DATED at AUCKLAND this 12th day of November 2013

D J Mackenzie
Chair