NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 49

LCDT 023/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 5** Applicant
AND	**CHRISTOPHER MICHAEL CLEWS** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr K Raureti

Mr P Shaw

Mr T Simmonds

Mr I Williams

HEARING at Auckland

DATE OF HEARING 13 August 2014

COUNSEL

Mr R McCoubrey for Standards Committee

Mr P Gorringe for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
(Penalty Decision)

[1] This decision concerns the penalty to be imposed on a senior practitioner who was found guilty of two charges of misconduct earlier this year. The charges were serious ones. The first involved a breach of client privilege in circumstances which could have had very serious consequences for the client. The second charge arose when Mr Clews approached a former client in prison, obtained his authority to uplift his files from the current lawyer, when he had just been found guilty of unsatisfactory conduct in respect of that client. Thus he acted where there was a conflict between his interests and that of the client, who was the same client in respect of whom he had breached privilege. The full background is contained in our Liability Decision of 30 April 2014.

[2] The Standards Committee seek that the practitioner be suspended for six months, censured, fined and repay all legal costs associated with the prosecution. They also request that he undergo practical training as required by the New Zealand Law Society ("NZLS").

[3] Mr Clews, through his counsel, acknowledges that because of the seriousness of his misconduct, suspension was an understandable request but relied on his long history of good service to the profession and what he described as his good intentions throughout to seek to avoid suspension.

Issues

1. What are the applicable principles of penalty and position in this case?

2. Are there any aggravating features of the misconduct?

3. What are the mitigating factors for the practitioner?

4. Is suspension required to reflect the seriousness of the offending?

Issue 1 - applicable principles

[4] In *Hart*[1] - the seriousness of the offending was found to be the starting point:

> "The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practise …"

[5] Both counsel were agreed that the offending under consideration in this case was very serious. Lawyer-client privilege is one of the fundamental concepts of legal practice, and members of the public would be dismayed to think that its breach could be treated other than very firmly. It was described by the Supreme Court of Western Australia as "a cardinal sin".[2]

[6] In relation to the second charge we found that Mr Clews had recklessly contravened Rule 5 and 5.4 and was in a position of irremediable conflict.

[7] Once again this is a very serious matter. Clients cannot be expected to understand or be aware of conflicts of interest when they exist or when there is potential for them. We note that the only use to which the practitioner put these files once he had uplifted them from his former client, was to assist him in resolving a dispute with the Legal Services Agency ("LSA") over his fees. Nothing further was done about the pardon which had ostensibly been the basis for uplifting the files.

[8] General deterrence is a significant factor in assessing penalty in this matter. As was stated in *Daniels:*[3]

> "A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit in the wider sense to practice are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

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[1] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83 at [186].
[2] *Legal Practitioners Complaints Committee v Walton* [2006] WASC 213.
[3] *Daniels v Complaints Committee of the Wellington District Law Society* [2011] NZLR 850.

Issue 2 - aggravating features?

[9] In relation to the breach of confidentiality charge we considered this was aggravated by Mr Clews putting his interests ahead of his client's in wanting to give his version of events, even though he had persuaded himself that he was attempting to assist his former client. In relation to Charge 2 we also found[4] he aggravated his behaviour by attacking a colleague in writing in an unrestrained way, while he attempted to justify his own behaviour. We note with approval that Mr Clews has subsequently apologised in writing to this practitioner.

[10] In terms of disciplinary history we note there was one finding of unsatisfactory conduct which related to the manner in which Mr Clews conducted the trial, the appeal from which led (indirectly) to these two charges. Thus, this is a somewhat unusual situation in that there is a nexus between these charges and the only other adverse finding against the practitioner. We consider that does reduce the seriousness of the disciplinary history.

Issue 3 - mitigating factors

[11] Mr Clews has been in practice for over 30 years and from references provided to us, would appear to have been a practitioner well motivated to achieve what was best for his clients. He has also clearly been a very busy practitioner who has not at all times been as careful or strategic in his approach to his work as he might have been.

[12] We accept the submission that had he been a more reflective type of practitioner he might well have avoided the current charges.

[13] Mr Clews is a practitioner who has given a great deal back to the profession, including serving as President of the Waikato/Bay of Plenty branch of the New Zealand Law Society. That he has made such a contribution done so, over a period of more than 30 years while conducting a busy practice is significantly to his credit, and we regard this as a strong factor in mitigation of his penalty.

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[4] *Auckland Standards Committee No. 5 v Christopher Michael Clews* [2014] NZLCDT 19 at [32].

[14] The fact that Mr Clews now accepts that his judgment was seriously lacking in the manner in which he conducted himself is also to his credit. He expresses, through his counsel, considerable remorse.

[15] We also accept that, given his past high profile within the local Law Society, the publication of details of this offending will in itself be punishment.

Issue 4 - is suspension necessary?

[16] Mr McCoubrey for the Standards Committee submitted that this level of misconduct could not properly incur any penalty less than suspension. For Mr Clews while Mr Gorringe responsibly recognised that suspension was a predictable outcome, he urged the Tribunal to the view that the public interest did not require it in the case of this particular practitioner. Mr Gorringe pointed us to the strong mitigatory factors and to his client's good intentions, albeit misplaced judgment.

[17] We have referred already to the *Daniels*[5] decision. We remind ourselves that decision also referred to the principle of "the least restrictive outcome".[6]

[18] We consider our obligation to uphold high professional standards and thereby maintain public confidence in the provision of legal services, require us to mark this particular conduct with a period of suspension.

[19] Given the practitioner's long history of service to clients and to the profession, we consider he is entitled to some credit and therefore rather than impose a period of six to nine months which we would otherwise consider to be the proper penalty, will impose a period of four months suspension.

[20] We recognise that the practitioner employs a significant number of staff and has currently Court commitments which in the interest of his clients we consider he ought to be permitted to meet. For these reasons the period of suspension will commence on 1 October 2014.

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[5] See note 3.
[6] At para 22.

[21] The practitioner defended the proceedings, as he is entitled to do, but this has a consequence in the costs incurred in the prosecution and hearing. We consider that the practitioner ought to meet the burden of these costs rather than have that fall back on his fellow members of the profession. We make the following orders:

Orders

1. Mr Clews will be suspended for four months beginning 1 October 2014.

2. Mr Clews is formally Censured.

3. Costs to the Standards Committee up to a figure of $19,000 are to be paid by Mr Clews.

4. The s 257 costs which are certified in the sum of $6,979, are to be paid by the New Zealand Law Society pursuant to s 257.

5. Mr Clews is to reimburse those s 257 costs to the New Zealand Law Society.

6. Mr Clews is to undertake training on privilege and confidentiality with a practitioner identified by the New Zealand Law Society. Such training is to be at Mr Clews' expense and is not to exceed four hours.

DATED at AUCKLAND this 20th day of August 2014

Judge D F Clarkson
Chair