NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

DECISION NO: [2009] NZLCDT 5

LCDT 01/08

	BETWEEN	CANTERBURY DISTRICT LAW SOCIETY COMPLAINTS (NO. 2) COMMITTEE Complainant
	AND	LEUATEA IOSEFA Practitioner

Hearing:	21 May 2009
Appearances:	Mr H van Shreven for the Complainant Mr J Eaton for the Practitioner
Chair:	Judge D F Clarkson
Members of Tribunal:	Mr L Cooney Mr P Radich Mr M Gough Mr A Lamont
Decision:	19 June 2009

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

CHARGE

[1] Mr Iosefa is charged by the Canterbury District Law Society Complaints (No. 2) Committee ("the Society") under s.241(d) of the Lawyers and Conveyancers Act 2006 ("the Act") "that having been convicted of an offence punishable by imprisonment, that conviction reflects on your fitness to practise as a lawyer or tends to bring your profession as a lawyer into disrepute."

[2] The practitioner has admitted the charge and the hearing concerned the issue of penalty and costs.

BACKGROUND

[3] The details of the offending which found this charge are succinctly reported in the statement of facts which was presented to the District Court on 4 July 2008 when the practitioner pleaded guilty to the offence of theft by a person in a special relationship (s.220 and s.223(a) of the Crimes Act 1961). At the hearing before the Tribunal the practitioner confirmed that he accepted the statement of facts, the synopsis of which is as follows:

[4] On 10 December 1999 the practitioner's firm, he being a sole practitioner employing a small staff, completed a conveyancing transaction on behalf of Mrs D. That resulted in the sum of $83,700.73 being deposited as the balance of the transaction into the firm's company's trust account in the name of Mrs D on 13 December 1999. Mrs D is an 86-year-old widow. Mrs D's funds were placed on an interest bearing deposit account so that interest could be earned on her behalf. Between 20 December 1999 and 17 May 2000, on eight separate occasions the practitioner drew varying amounts from Mrs D's trust account for his own purposes. By 17 May 2000 Mrs D's trust account had a zero balance.

[5] From late 2000 Mrs D from time to time made requests for partial withdrawal of the funds. Between 26 January 2001 and 20 December 2005 the practitioner in fact made three separate payments back to Mrs D totalling $30,000. He acknowledges that at times these payments were significantly delayed and on the last occasion less was tendered than the amount requested.

[6] Between 1995 when the practitioner's mother had died suddenly and late 1999 when the practitioner's actions began, the practitioner's personal and financial circumstances had deteriorated markedly. He had incurred unmanageable debt as a result of the very large funeral he as the eldest son was required to provide for his mother who was of very high standing in the Samoan community. He then took his elderly father to live with him and has supported him since that time.

[7] Prior to the practitioner's late mother's death, he and his wife had committed to building a new home and the effect of the debt for funeral expenses meant that they were unable to meet their mortgage obligations and had to sell their home. There was a shortfall in sale proceeds leaving the practitioner even further in debt. At the same time the practitioner did not manage his tax liability well and became seriously indebted to the Department of Inland Revenue. Towards the end of 1999 Inland Revenue threatened him with bankruptcy proceedings which would have, of course, meant that his practising certificate would have been suspended. He was clearly deeply concerned not only about his own career but also about the welfare of those staff members employed by him and his wife and children, for whom he was principal provider.

[8] The practitioner who was of very high standing within the Samoan community felt unable to seek help from the many close friends and legal colleagues who have subsequently supported him through this process. Instead of turning to them for help or to family members he elected to follow the path of using Mrs D's funds to repay initially the Inland Revenue debt and then to continue to bolster the funds of his firm which was clearly facing financial difficulties.

[9] This is not a case of a lazy or greedy practitioner because the references filed on his behalf attest to his strong work ethic and the long hours worked by the practitioner on behalf of his clients and also on behalf of the community. The practitioner was involved in much voluntary and unpaid work and this clearly contributed to the financial mess that he found himself in.

[10] In May 2006 Mrs D complained to the Canterbury District Law Society about the difficulty she was experiencing accessing her funds and an investigation began.

[11] The practitioner has faced earlier charges before the Canterbury Law Practitioners District Disciplinary Tribunal. In April of 2005 he faced charges of professional misconduct in relation to the repeated breaches of rules and regulations governing the conduct of solicitor's trust accounts. The period of breaches was between June 2002 and December 2003. He pleaded guilty to that charge and as a result of the hearing was censured, fined, and ordered to pay costs. In addition an order was made under s.106(4)(c) of the Law Practitioners Act 1982 that he not practise with a trust account and that notice of this order be forwarded to the New Zealand Society. This order becomes relevant when considering the practitioner's future right to practise. During the entire period of this earlier investigation and Tribunal hearing the practitioner was conscious that he still had funds belonging to Mrs D, however said nothing of this to the Law Society or to the Tribunal.

[12] Finally in September 2006, over six years after the funds were taken and a year after the previous Disciplinary Tribunal had ordered him not to have a trust account he made final repayment of the capital sum to Mrs D. He wrote to her at this time offering an apology and offering the sum of $2,185 in respect of lost interest. This is interest in respect of a total capital sum of $83,700 over a

six-year period. This Tribunal was not impressed with the letter which it considered was manipulative and misleading.

[13] The Tribunal read this letter as more directed to self-preservation and minimisation of exposure to an interest claim rather than as an apology as claimed by the practitioner in his affidavit.

[14] There was a lengthy dispute over reparation for Mrs D. The practitioner finally agreed, at the point of sentencing, to reparation totalling $31,664.39. Although payment of the last outstanding amount of $9,264.29 would be paid, according to the practitioner's first affidavit, on 31 March 2009, the balance was not paid by him until the day before this disciplinary hearing in late May.

[15] In late January 2007 the practitioner was charged with the criminal offence referred to and pleaded guilty to 4 July 2008. He was sentenced on 7 August 2008 to 10 months imprisonment.

[16] The practitioner appealed his sentence and on 3 November 2008 the Court of Appeal altered his sentence, having regard to a number of factors including time served, to four months home detention subject to special conditions which had pertained to the earlier sentence.

SUBMISSIONS FOR THE PRACTITIONER

[17] Counsel for the practitioner submitted to the Tribunal that, in all of the circumstances, the appropriate outcome was for the practitioner to be suspended from practice for a term of three years so that, at the end of that period, he could return to practise his profession (but only as a Barrister) and continue to serve clients in areas of the law where he was capable and where he would be removed from having to deal with clients' monies.

[18] It was submitted to us that while the practitioner's conviction was recent, the conduct which gave rise to the conviction was "historical", it being said to have arisen almost ten years ago. It was then submitted that we are required to address the issue of whether the practitioner is a "fit and proper" person to practise law on the basis of the present position and not on a basis which is focussed too heavily on the events of the past which gave rise to the conviction.

[19] We begin by reminding ourselves that there are eight separate occasions over some six months in late 1999 and 2000 when the practitioner deliberately took monies from trust funds which he held for his client, an 86-year-old widow. Over a period of some years the practitioner's client sought varying amounts of her money and experienced delays in receiving payment. She was unaware that her monies had been stolen and that the delays were arising as the practitioner endeavoured to replenish the fund which he had destroyed by theft.

[20] We do not therefore consider that it is correct to categorise the behaviour which has given rise to this charge before us as having occurred and having been exhausted some ten years ago. The reality is that this was continuing unacceptable behaviour on the part of a lawyer who, having taken funds from a client, continued to hide that fact and continued to have the use and benefit of those monies to the detriment of the interests of his client. While the offence was not a continuing offence, the preferment of personal interests over the interests of a client has continued in a most serious way.

SUBMISSIONS FOR THE SOCIETY

[21] Mr van Schreven for the Society submitted that the practice of law and the status of being a lawyer is a privilege. He went on to refer the Tribunal to the decision of the Full Court of the High Court in *Pou v Waikato Bay of Plenty Law Society* H.Court ROT CIV-2004-463-0511, 10 May 2005, para 42 where Their Honours Baragwanath and Courtney JJ referred to this privilege pointing out that "with great privilege comes great responsibility", and went on to refer to the often quoted case of *Bolton v Law Society* [1994] 2 All ER 486.

[22] Mr van Schreven acknowledged that the testimonials put forward on behalf of the practitioner along with his voluntary work were important. He submitted that those factors could not "outweigh the facts of Mr Iosefa's conviction for serious theft and the inevitable impact that has on his presentation as a fit and proper person to be accorded the privilege of office that Mr Iosefa seeks".

[23] At the very time of his appearance before the District Disciplinary Tribunal in 2005, the practitioner knew, but the Canterbury District Law Society did not know, that there had been theft of clients' monies in 1999 and 2000 and that repayment of a substantial part of the monies stolen had not occurred despite requests from his client for payment.

[24] At the hearing of the charge before us, we became troubled by these circumstances and we raised our concerns with the practitioner's counsel.

[25] Mr Eaton's response was that we should see the practitioner's conduct in not making the disclosure to the hearing in 2005 as understandable and typical of ordinary frailties of human behaviour and that therefore we should not put too much weight on this against the practitioner.

[26] We do understand the motivations that would have caused the practitioner to continue to conceal the fact that he had stolen clients' monies. If the matter before us were a criminal sentencing we could more readily accept the force of the submission made to us by Mr Eaton. In this case however, what is before us is a very different question. It is the question whether the practitioner is a fit and proper person to continue to have his name entered on the Roll of Barristers and Solicitors. It

is also the question whether the practitioner is a fit and proper person, having regard to his conduct to continue to practise law, albeit after a period of suspension.

[27] If we were to accept Mr Eaton's arguments that the offending occurred "almost 10 years ago", this would ignore all of the efforts to cover up that offending in the intervening years until 2006. We consider that if we were to consider such an approach in assessing the practitioner's fitness, then there would be some unfortunate messages sent to the public and the profession that we consider would contravene the purposes of the Act and the client care rules. In terms of professional discipline this is an ongoing serious breach of fiduciary duty that did not cease in May 2000 with the last theft from the victim's trust account. The nature of this offending strikes at the very heart of the relationship between solicitor and client.

OTHER MATTERS

[28] Two further matters emerged from the hearing which while of less concern are still serious matters which go to the issue of fitness to practise. In response to a question from a member of the Tribunal as to previous Court appearances the practitioner revealed that he had two previous convictions in 2005, one for failure to file tax returns and one for assault (s.196 Crimes Act). He confirmed that in respect of the latter the victim had received an injury following a dispute over a debt collection. It has to be said that both of these convictions reflect poorly on the practitioner and the profession as a whole. While we mention this matter, we attach no weight to it as this matter does not form part of the charge before us.

[29] In mitigation Mr Eaton has placed before the Tribunal a number of matters including 10 testimonials or letters of support from fellow practitioners. The letters attest to the practitioner's hardworking and generous nature, to his supportive behaviour as a colleague, to his popularity, integrity and respect. While such views weigh heavily with the Tribunal it has to be said that most of the testimonials proceed from the perspective that the practitioner has made one error of judgment some 10 years ago. In answer to a question from a member of the Tribunal the practitioner confirmed that "some but not all" of the author's of these testimonials were aware that they were to be provided for the purposes of this proceeding, rather than for the District Court sentencing for which they had originally been prepared. It is not clear whether all understood that the offending had continued undetected for a six-year period.

[30] Further it is clear that the practitioner has, at personal cost, made substantial contributions to his Samoan community and to the community in general throughout the course of his 22-year legal career. It is also accepted by the Tribunal that he continues to perform voluntary work for his community and continues to be well respected and of high standing within the community. The practitioner's personal circumstances clearly have suffered significantly as a result of the police

prosecution and conviction. However, as pointed out in the decision of Complaints Committee of the *Waikato Bay of Plenty District Law Society v Osmond* [1998] AP100/97, 13:

> "… we comment that such "suffering" was no more than the usual consequences arising upon conviction on a criminal charge of theft by a professional man, namely imprisonment, as well as ….. that the practitioner made immediate and full acceptance of responsibility and that there was no evidence of other defalcation. They may well have been mitigating matters when viewed in relation to usual "sentencing" principles but an order for striking off and the determination of being a fit and proper person to practise depends on honesty, knowledge and ability. A striking off order, although obviously a punishment, has primarily a different function, namely protection of the public and in its broader sense, the profession."

[31] The practitioner's family have suffered as a result of his inability to work as a lawyer and undoubtedly will continue to suffer financial loss if he is unable to work again.

[32] We take account of the fact that the testimonials provide support for the view that the practitioner is a talented and respected advocate and acknowledge that the role modelling aspect of this practitioner's professional life is important having regard to his membership of a cultural minority.

[33] The Tribunal is concerned however, that the practitioner still does not appreciate the gravity of what he has done for the following reasons. First, that he advances the submission that this conduct should attract suspension only, which we consider involves an unrealistic evaluation of the conduct. Secondly, the idea that a person who has some three years previously been convicted of theft could appear in the Courts as a lawyer seems to the Tribunal to involve an unrealistic view of what trust and confidence are about.

[34] The Tribunal adopts (with the emphasis added) paragraph 19 of the Reasons of Tribunal given on 12 March 2001 in relation to the decision of the New Zealand Law Practitioners Disciplinary Tribunal given in *Wellington District Law Society v Tannahill*:

> "[19] In *Bolton v Law Society* [1994] 1 WLR 512 Sir Thomas Bingham MR (with whom the other judges of the English Court of Appeal agreed) expressed his agreement with the opinion expressed in the lower court that the client account of a solicitor is "sacrosanct" (page 517). At pages 518-519 he said – with our emphasis added:
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> > ***It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness. That requirement applies as much to barristers as it does to solicitors****. If I make no further reference to barristers it is because this appeal concerns a solicitor, and where a client's moneys have been misappropriated the complaint is inevitably made against a solicitor, since solicitors receive and handle clients' moneys and barristers do not.*

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. ***Lapses from the required high 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 advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.*** *Only infrequently, particularly in recent years, has it been willing to order the restoration of the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike of or to suspend will often involve a fine and difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the Tribunal be likely to regard as appropriate any order less severe than one of suspension.*

It is important that there should be full understanding of the reasons why the Tribunal makes orders which might otherwise seem harsh*. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment.* ***But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied.*** *The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off****.*** ***The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission.*** *If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that impairs.*

> ***Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposes in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.*** *Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right.* ***The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price****."*

DECISION

[35] It must therefore follow that the personal circumstances of a practitioner have to be seen as secondary to the need to maintain standards. It is not consistent with proper standards of "fitness" for the practitioner before us to be allowed to remain a member of the law profession. His having taken clients' money over a period of time, having had the use and benefit of those monies to his clients' disadvantage, having been untrustworthy before his professional body and having brought discredit upon the law profession means that we are obliged to remove his name from the roll of practitioners and we unanimously hold accordingly. Consequently, pursuant to section 242(c)of the Lawyers and Conveyancers Act 2006, we order that Mr Iosefa's name be struck off the roll.

[36] The standards to be expected of a lawyer are those of complete integrity, probity and trustworthiness. It is plainly not consistent with the standards which are expected of a lawyer for that lawyer to misappropriate client funds in the first place then drag out reimbursement over many years while concealing the misappropriation and by then allowing his professional body to misunderstand the gravity of the situation within his practice through an ongoing concealment of the misappropriations. As was said in *Bolton v Law Society*:

> "A profession's most valuable asset is its collective reputation and the confidence which that inspires."

This view, repeated many times by the predecessor to this Tribunal and by the High Court and the Court of Appeal is one which we adopt. The professions which serve our communities are important for the continuing welfare of our communities and the reputations and standards of our professions need to be protected.

COSTS

[37] The Tribunal has the power to make an award of costs and expenses under s.249 of the Act. Subsection (1) gives the Tribunal wide jurisdiction to "… make such order as to payment of costs and expenses as it thinks fit."

[38] The authorities (refer para 44 *Tannahill* decision above) decided under the previous legislation support Mr Eaton's contentions (which were not opposed by

[39] Mr van Schreven) that costs orders are not intended to be punitive and that practitioner's ability to pay is relevant. The Tribunal accepts that the principles established under the earlier cases apply in respect of s.249 of the Act.

[40] Argument was also heard concerning s.257 of the Act which is a mandatory provision requiring the Chair of the Tribunal to fix and the New Zealand Law Society or the Society of Conveyancers to pay the costs and expenses of the Tribunal in respect of any hearing. Initially Mr van Schreven sought to argue that s.257 provided authority for an inter partes award of costs, however it is clear from the wording of s.257 that with one exception, the section contemplates recovery by the Crown from the professional body. The exception is contained in subs (2)(d) whereby the Crown is not to recover that part of the cost which has been already recovered from the Tribunal "from any other person". The Tribunal's view is that this is directed to the situation where the Tribunal makes an order against a practitioner to contribute to the cost of the proceeding, similar to an award of "Court costs" in a criminal proceeding in the District Court.

[41] The Tribunal has no difficulty in restating the principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault if at all possible, rather than on his or her professional body as a whole.

[42] In an appropriate case the person charged can be ordered to pay:

- The costs and expenses of the prosecutor in relation to the prosecution.

- The expenses incurred by the New Zealand Law Society in relation to an investigation (including staff and overheads).

- The expenses involved in the hearing, including the costs of the Tribunal.

[43] In this case the personal circumstances of the practitioner have been set out in the second affidavit sworn by him shortly before the hearing. It is said that his personal circumstances are parlous, his indebtedness is high and he and his family are being supported by the sole income of his wife. His wife has had to move to another city in order to earn income to provide for the family. The practitioner had to borrow to pay the final reparation payment and has outstanding solicitor's costs. He conceded however, that he had not sought employment. He did not clarify his asset position although reference was made to a Family Trust.

[44] Accordingly, the Tribunal reserves the question of costs and directs Mr Iosefa to file a Declaration of his financial means which is to set out his asset position and that of any Family Trust of which he is a trustee or beneficiary, within 14 days of the release of this decision.

SUPPRESSION ORDER

[45] In accordance with s.240 of the Act there is an order prohibiting the publication of the name of the practitioner's former client.

[46] There is no order for suppression of the name of the practitioner. No such order was sought.

D F Clarkson
Chair
New Zealand Lawyers and
Conveyancers Disciplinary Tribunal