IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 5
LCDT 005/11

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of Junior Lambert Witehira, of Auckland, Solicitor

TRIBUNAL

Chair
Mr D J Mackenzie

Members
Mr S Grieve QC
Mr C Lucas
Mr P Shaw
Mr W Smith

COUNSEL
Mr P David, for Auckland Standards Committee 2
Mr V Ruwhiu, for the practitioner, Mr Witehira

HEARING at Auckland on 21 March 2012

Orders made for Striking off the Roll, Costs, and Suppression

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Mr Witehira was charged by Auckland Standards Committee 2 with misconduct arising from his misappropriation of client funds. The misconduct and the particulars in support of the charge were admitted by Mr Witehira.

[2] When the Tribunal convened in Auckland on 21 March 2012 to hear submissions on penalty, Mr Witehira sought leave to provide further evidence in support of his submissions. For the Standards Committee, Mr P David had no objection, and the additional evidence was allowed.[1]

[3] At the conclusion of the hearing the Tribunal reserved its decision. Pending that decision the Tribunal granted interim suppression of name in respect of the clients affected by the conduct which led to the charge, and in respect of the persons who initially reported the matter to the Complaints Service of the New Zealand Law Society.

Background

[4] The misconduct charge resulted from Mr Witehira misappropriating funds from two clients of his former firm, Far North Law. The funds were taken from Mr Witehera's solicitor's trust account and lodged to his own bank account entitled "Far North Law – Office Development Account". Neither client had authorised such a transfer of funds.

[5] In the first unauthorised transfer of client funds, Mr Witehira took $22,917.95. The trust account cheque for this amount was lodged to the Far North Law – Office Development account on 24 September 2010.

[6] The butt for the trust account cheque drawn against the client concerned recorded the cheque as being payable to "*Hunter Law & Associates for settlement of balance of [suppressed]*". On the cheque itself the name of the payee had been left blank. The cheque and its accompanying bank deposit slip had both been signed by Mr Witehira.

[1] Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, clause 25 requires that all evidence must be given by affidavit unless the Tribunal allows otherwise.

[7] In the second unauthorised transfer of client funds, Mr Witehira took an amount of $810.15. The trust account cheque for this amount was also lodged to the same bank account as had been used for the $22,917.95 taken. This second lodgement occurred on 7 October 2010.

[8] The butt for this second trust account cheque drawn against the client concerned recorded the cheque as being payable to "*[suppressed] for reimbursement of funds held on account*". On the cheque itself the payee was shown as "*Far North Law No. 2 Account*". Both the cheque and its accompanying deposit slip had been signed by Mr Witehira.

[9] By letter dated 23 November 2010, [*suppressed*] raised with the Lawyers' Complaints Service allegations of misappropriation of client funds by Mr Witehira. [*Suppressed*] had become aware, as a consequence of seeing a bank statement for "Far North Law - Office Development Account", that the client funds noted above had been deposited to that account. Investigation of trust records by [*suppressed*] confirmed the circumstances relating to the taking of funds as set out above.

[10] [*Suppressed*] confronted Mr Witehira who, after some initial denial, eventually accepted that he had inappropriately taken the funds. Mr Witehira repaid the amounts taken on 21 October 2010.

[11] As a result of the allegations made the New Zealand Law Society arranged for one of its inspectors to visit Far North Law and investigate the allegations. That inspector found evidence that the allegations of misappropriation of client funds had a factual basis, and as a consequence the Standards Committee commenced a formal investigation and invited Mr Witehira to make any submissions he felt relevant.

[12] In response Mr Witehira wrote to the Standards Committee on 21 December 2010 advising that he "*had been experiencing difficulties in receiving payment from the Legal Services Agency*" and that his practice had been unable to generate "*sufficient billings outside of legal aid to meet costs*", which resulted in "*ongoing cash flow problems*". He also noted ongoing issues within his personal relationship, exhaustion, and that he had been diagnosed with [*suppressed*].

[13] In that letter Mr Witehira also said that on 24 September 2010, when dealing with some funds due to clients, he was conscious of the fact that he was due to repay his bank $7,500 that day. He said that he had been expecting a

substantial payment of legal aid funds which had not occurred, so he had "*made the decision to withdraw the funds on 24 September 2010 totalling $22,917.95 from my trust account to meet the repayment until I could arrange to cover this amount".* The evidence showed this repayment of his overdraft was undertaken by Mr Witehira moving the misappropriated funds from his Far North Law – Office Development Account to his general business account for Far North Law.

[14] Because of the serious nature of the allegations it was proposing to investigate, the committee considered formal intervention in Mr Witehira's practice under sections 162-182 of the Lawyers and Conveyancers Act 2006. Although not formally exercising its rights under those provisions, the committee decided to intervene informally.

[15] Mr Witehira had appointed, by power of attorney, a local practitioner to conduct Mr Witehira's practice, Far North Law. The committee required, and received, a number of undertakings from Mr Witehira regarding his on-going involvement in the practice. Those undertakings included Mr Witehira agreeing that he would not exercise any control over the practice's trust account, not open a new trust account, not deal with any client funds, and that he would relinquish his e-dealing licence and any digital certificates. He also acknowledged that he would take all steps necessary to facilitate the operation of his practice through his practice attorney.

[16] After its enquiry was completed, the Standards Committee determined that the matter should be referred to the Tribunal, and the misconduct charge was laid. Mr Witehira filed a formal response.[2] In that response he admitted the misconduct and the facts alleged in support of the charge. He also filed an affidavit providing some detail regarding his practice history and his personal background and financial position.

[17] That affidavit reconfirmed advice he had given to the Standards Committee in his submission to them regarding financial pressures in his practice and the reason he took the client funds for his own purposes. In mitigation he deposed that there had "*been circumstances which have contributed to the charge*".

[18] Those circumstances repeated matters he had submitted to the Standards Committee, including pressure of work, cash flow problems, relationship issues, and physical and mental exhaustion and that as a consequence his decision

[2] As required by the Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008, clause 7.

making was "*out of character*". Mr Witehira also noted that he had been diagnosed with [*suppressed*] in early December 2010. Following that he said, he had sought to rehabilitate himself both mentally and physically.

Submissions on Penalty

[19] The Standards Committee submitted that the misappropriation of client funds by Mr Witehira constituted misconduct of a very serious nature. The requirement for confidence in the profession and protection of the public were noted as key elements when addressing misconduct of this nature it said.

[20] The committee noted that the conduct was quite deliberate, and reflected on Mr Witehira's fitness to practise. Because of the nature of the misconduct severe sanction was required and personal circumstances put forward in mitigation had to be assessed having regard to the prime requirements of public confidence and protection, it submitted.

[21] The committee said that the misconduct the subject of the charge had occurred shortly after Mr Witehira's accounts had been audited by the New Zealand Law Society, which itself had raised a number of concerns and ultimately resulted in a disciplinary finding against Mr Witehira.

[22] The position of the Standards Committee was that in all the circumstances Mr Witehira should be struck off the roll of barristers and solicitors, as he was not a fit and proper person to practise. The committee also sought its costs totalling $7,435, and reimbursement of Tribunal costs the New Zealand Law Society would incur.[3]

[23] For Mr Witehira it was submitted that there was no sustained and persistently inappropriate conduct, just one isolated act of misconduct, and that the context of the misconduct should be taken into account in deciding whether Mr Witehira was a fit and proper person to practise.

[24] Counsel for Mr Witehira noted that Mr Witehira was a sole practitioner, struggling with work, personal, and financial pressures, who was likely to have been suffering from [*suppressed*] at the relevant time. His judgment was adversely affected by these factors it was said, and he panicked when faced with a

[3] Lawyers and Conveyancers Act 2006, section 257(1)(a).

situation where his overdraft was due for repayment, and he took client funds without stopping to consider alternative ways of dealing with the situation he faced.

[25] It was submitted there was no pre-planning, the taking of the client funds being "*a spur of the moment decision that was made out of panic and not being rational and looking at the problem in a proper considered way. There was no persistent sustained inappropriate conduct.*" Mr Witehira's counsel also suggested that the conduct did not involve any systematic or sophisticated plan to cover the offending, evidenced by a lack of any attempt to conceal banking information and office records.

[26] Mr Witehira's [*suppressed*] was also something that should be considered to mitigate the seriousness of his misconduct it was said, as was his ready admission, rectification by repayment, and acceptance of the need to rehabilitate. In regard to this latter point, Mr Witehira has taken a position as an employed solicitor with an Auckland sole practitioner, and engages only in litigation and has nothing to do with the firm's trust account, client funds, or payments to or from the firm. His new employer deposed that he was prepared to "*give him a go*" and that to date he did not believe his trust and confidence had been abused.

[27] For Mr Witehira, it appeared to be his counsel's submission that suspension would be an appropriate starting point in considering penalty, if his client was considered a fit and proper person to practise by the Tribunal and thus not struck off.[4] Having reached that point, the submission continued that the Tribunal would then be free to consider a suspension sanction and balance that against the consequences to the practitioner. This approach, it was suggested, would enable the Tribunal to reach a point where it was able to conclude that it did not need to impose suspension, recognising Mr Witehira's new role as an employed solicitor in a role limited to litigation, and recognising his financial needs. Losing his ability to work as a lawyer would have serious financial repercussions for Mr Witehira it was submitted, as it would mean loss of income, and an alternative career which could replace that income was not likely.

Discussion

[28] Serious misconduct has been admitted. The accepted facts show that Mr Witehira has misappropriated client funds totalling $23,728.10, and applied funds

[4] See paragraphs 29 and 30 of submissions of counsel for the practitioner.

so taken for his own benefit. He used the funds to meet an overdraft repayment commitment that he had, which was due to his bank. He also applied funds to meet various expenses he had in his practice. There is clear dishonesty in his taking of the client funds.

[29] The Tribunal does not accept that this was a single, spur-of-the-moment lapse in judgment as claimed for Mr Witehira. This was a deliberate misappropriation occurring on two separate occasions, followed, in the case of the first amount misappropriated, by a number of separate acts involving further application of those funds;

(a) the first sum misappropriated ($22,917.95) was banked to Mr Witehira's "Office Development" account on 24 September 2010. On the same day he transferred $7,500 from that account to his general practice account to repay his bank overdraft. On 4 October 2010, a further $900 was drawn from the "Office Development" account to pay practice staff wages. Two days later, on 6 October 2010, he drew another $1,600 from that account for the same purpose.

(b) on 7 October 2010, Mr Witehira banked to his "Office Development" account the second sum misappropriated, $810.15.

This continuing course of conduct represents the execution of a deliberate and planned taking and use of funds over a period, not a single spur-of-the-moment episode. In any event, even if the Tribunal accepted that this episode was spur-of-the-moment, it would be unlikely to make any difference to our determination on penalty, given the serious nature of the misconduct.

[30] The Tribunal also does not accept Mr Witehira's suggestion that he did not seek to disguise what he had done, and that he always knew that it would come to the attention of [*suppressed*]. The evidence indicates that it was highly likely that he intended that the misappropriations not be discovered;

(a) the cheque butts showing payee names were deliberately misleading, differing from payee endorsement on the cheques themselves, indicating a desire to disguise the true destination of funds;

(b) [*suppressed*] who first brought the matter to the attention of the Law Society confirmed to the Society that the discovery of the misappropriations was fortuitous. The misappropriation may well

> have escaped attention if not for the "Office Development" account bank statement being seen and client fund amounts deposited to that account identified, as it was not an account that was dealt with as a normal part of the practice's administration.

[31] It was suggested that Mr Witehira's decision to take the funds reflected his [*suppressed*] at the time, Mr Witehira being affected by a number of factors and having been diagnosed with [*suppressed*]. While acknowledging that he may have suffered some work pressure and been unwell, there was nothing before the Tribunal which could explain, let alone justify, the fact that there has been serious misconduct of the nature admitted. The fact remains that he has breached the trust of his clients, and misappropriated their money in the manner and circumstances noted.

[32] In our view there can be no doubt that Mr Witehira's misconduct, involving serious dishonesty arising from his misappropriation of client funds for his own use, must result in a finding that he is not a fit and proper person to be a legal practitioner, and strike off may follow. This is not a punitive response, but a response that is necessary to protect the public and the reputation of the legal profession, which reputation relies in large part on trust. *Bolton v Law Society*[5] remains a determinative authority in New Zealand.[6] *Bolton* makes clear the importance of protection of the public and the profession's reputation, and that this will normally require removal of the offending practitioner from practice.[7]

[33] We have also considered Mr Witehira's past disciplinary history. While not a decisive factor in our decision, we note that Mr Witehira has previously (December 2007) been found guilty of professional misconduct, on that occasion for failing to honour an undertaking.

[34] In April 2011 he was found guilty of unsatisfactory conduct. Of note in this latter case is that it related to a sum of $7,000 that had been transferred from Mr Witehira's trust account to his general account, apparently due to a bank error when he was arranging an overdraft in 2005. Despite discussions with the Law Society Inspectorate about rectifying this error, it had still not been rectified some five years later. When the Inspectorate completed its 2010 report on Mr Witehira's practice, it said in that report;

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[5] [1994] 2 All ER 486.
[6] For example, see *Shahadat v Westland District Law Society* [2009] NZAR 661 and *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162.
[7] Ibid at 491(g) - 492(f).

> "*…you have had an unauthorised advance of $7,000 from clients of your practice for almost 5 years…"*

[35] The evidence before the Tribunal was that Mr Witehira had "*buried his head in the sand about this matter"* and had taken no steps to rectify the unauthorised advance, nor had it been reported to the New Zealand Law Society in his end of month certificates as required for such a matter.[8]

[36] Apart from indicating an unacceptable attitude to such matters by Mr Witehira, this earlier issue had been the subject of an investigation by the Standards Committee. It had advised Mr Witehira of its concerns only days before he misappropriated the amounts the subject of the present misconduct charge. It may be that the resolution of the committee at the time, to take no further action (later reversed by the Legal Complaints Review Officer, resulting in finding of unsatisfactory conduct) gave Mr Witehira some misplaced confidence about his ability to utilise client funds without sanction. More importantly, it meant that he would have been well aware at the time he decided to take the client funds the subject of the current charge that it was inappropriate.

[37] In summary, our view is that Mr Witehira is not a fit and proper person to practise as a legal practitioner, and we consider that he should be struck off the roll for his misappropriation of client funds the subject of the misconduct charge. His counsel submitted that the decision of the Standards Committee not to formally intervene in Mr Witehira's practice at the outset meant that there was some recognition that Mr Witehira could remain in practice in certain circumstances. We do not accept that the process adopted by the committee should be construed in that way. The committee was concerned with public protection in the interim, and it achieved that by severely restricting what Mr Witehira could do in his practice, and by ensuring his practice was operated by his attorney. The committee's position is clear. It has submitted to the Tribunal that we should find Mr Witehira not to be a fit and proper person to practise, and that he should be struck off.

[38] We accept that Mr Witehira will face some hardship if removed from practice, but that does not change the public interest requirements of the regulatory response which is appropriate in this case, the removal of Mr Witehira from practice. The public interest has far more weight than his personal interest in this situation, and we consider that his dishonesty, and consequent risk to the

[8] Affidavit of [*suppressed*], Annexure "C" (dated 7 March 2012).

public and profession, has to be addressed by striking Mr Witehira off the roll.[9] His conduct has shown that he is not a fit and proper person to practise as a barrister and solicitor of the High Court.

Costs

[39] Costs under section 257(1)(a) Lawyers and Conveyancers Act 2006, payable by the New Zealand Law Society pursuant to that section, are certified at $5,000.

[40] The Standards Committee sought its costs of $7,435. It also sought reimbursement of costs incurred by the New Zealand Law Society as certified under section 257 Lawyers and Conveyancers Act 2006. Consequently, in total, the Standards Committee is seeking costs against Mr Witehira of $12,435.

[41] For Mr Witehira it was noted that he had lost his practice, and now worked as an employee in another law firm. That employment would be terminated if he lost his right to practise, and as a result Mr Witehira would lose his income. Evidence of his financial and personal position was filed with the Tribunal by Mr Witehira. It shows he is in a poor financial situation, both from a capital perspective, taking account of his assets and liabilities, and from a revenue perspective, taking account of his income and expenses. His income situation will of course deteriorate further as a result of his inability to work as a lawyer.

[42] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*[10] a Full Bench of the High Court confirmed that there was no hard and fast rule regarding costs in professional disciplinary cases. The court would only interfere if there was an exercise of discretion that was wrong in principle or clearly unreasonable. A factor in deciding what is reasonable is his ability to pay.[11]

[43] In light of the order we will make, which will remove Mr Witehira's current income of $70,000 per annum as a lawyer, (which will not be easily replaced in his circumstances), we consider a reduced costs order is appropriate. Nevertheless, we do consider that a practitioner found guilty of misconduct should take some responsibility for the cost burden imposed on the profession by his misconduct.

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[9] *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC Wellington, CIV-2011-485-000227, 8 August 2011 at paragraph [22]; *Bolton* (supra) at 492(g) - 493(a).
[10] Ibid at paragraph [43].
[11] See *Ellis v Auckland District Law Society* [1998] 1 NZLR 750; *Kaye v Auckland District Law Society* [1998] 1 NZLR 151.

Determination

[44] Mr Witehira has admitted the misconduct with which he has been charged. It is serious misconduct. The only appropriate response is to strike Mr Witehira off the roll, for the reasons previously noted.

[45] The Tribunal, having determined that by virtue of his misconduct Mr Witehira is not a fit and proper person to be a legal practitioner, Hereby Orders that JUNIOR LAMBERT WITEHIRA has his name struck off the roll of barristers and solicitors.

[46] In respect of costs, JUNIOR LAMBERT WITEHIRA is Hereby Ordered to pay the Standards Committee $5,000 towards its legal costs and to reimburse the New Zealand Law Society, 50% of the amount it is required to pay in respect of costs under section 257. The Tribunal's approach to costs, allowing a discount on total cost to the profession, is guided by our view of Mr Witehira's financial position and his ability to meet, at least at some time in the future, a share of the costs he has imposed on the profession.

Suppression

[47] The names of the clients from whom Mr Witehira took the funds and the names of the persons who identified the misappropriation and brought it to the attention of the Law Society, together with any information that may identify them, are permanently suppressed. Detail of the nature of Mr Witehira's medical condition is also permanently suppressed, as are the details of his financial position in evidence before the Tribunal.

Dated at Auckland this 3rd day of April 2012

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D J Mackenzie
Chair