NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 54
LCDT 026/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **AUCKLAND STANDARDS COMMITTEE**
Applicant

AND **JOHN ALAN VAN DER ZANDEN**
of Auckland, Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr J Clarke
Mr C Lucas
Ms C Rowe
Mr I Williams

HEARING at Auckland

DATE OF HEARING 25 July 2014

COUNSEL
Mr Morris and Ms Cameron for Standards Committee
Mr Fairbrother QC for the Practitioner

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

[1] Mr van der Zanden was found guilty of negligence in our decision of 2 May 2014. After a penalty hearing on 25 July we determined to suspend Mr van der Zanden from practice for three months, and made other orders, reserving our reasons. These are our reasons.

[2] The issues to be determined are:

1. How serious is the negligence?

2. Are there aggravating factors present?

3. Are there mitigating factors present?

4. Is suspension a necessary penalty in all the circumstances?

1. Seriousness of Conduct?

[3] The starting point is the seriousness of the conduct. In our decision we described the first misleading affidavit sworn by Mr van der Zanden as "sloppy" which was not explained by inexperience alone. We described the second affidavit as "utterly reckless of him".

[4] However we did not find that the conduct was either intentionally misleading or a completely reckless disregard of his professional obligations. We considered that the practitioner did not appreciate how serious the allegations (of prosecutorial misconduct) being made by him were, nor how much more careful he ought to have been in preparing a document for the Court of Appeal in the circumstances. In this respect his inexperience and lack of mentoring, as well as his sense of panic to

comply with time frames, provided some explanation and persuaded us there was no bad faith.

[5] However, we find the conduct to be towards the high end of the negligence continuum. Courts must be able to rely utterly on statements made to them by lawyers, as officers of the court. When those statements are in the form of a sworn affidavit, the obligation to be scrupulously accurate is even higher.

2. Aggravating Features?

[6] The aggravating feature of the offending is that it was repeated on two occasions. Having been warned by the Court of Appeal that he appeared to have misled them, Mr van der Zanden went on, without seeking legal advice and without having a file to check, to provide a further affidavit which repeated his errors.

[7] We do not consider there are any other aggravating features of the offending. Mr van der Zanden has been cooperative throughout the disciplinary process and was responsible enough to engage senior counsel to represent him.

3. Mitigating Features?

[8] We consider there are a number of mitigating features. Following our liability decision Mr van der Zanden filed an extremely contrite affidavit in which he apologised to the Court of Appeal and to the colleague about whom he had provided false information.

[9] Further he has taken steps to obtain a mentor and has indicated he is willing to have this arrangement formalised by an order under s 156 of the Act.[1]

[10] Since the hearing he has responsibly kept his new instructions relating to Court matters to a minimum anticipating that he may well face suspension.

[11] He has been willing to pay the costs of the prosecution which are significant, despite relatively modest personal circumstances.

[1] Lawyers and Conveyancers Act 2006.

[12] He has provided references as to his character and professionalism which we take account of.

[13] Finally we note that this is his first disciplinary offence in the 12 years that he was admitted to the Bar.

4. Suspension

[14] On behalf of the Standards Committee Mr Morris sought suspension of three to five months. He conceded that the practitioner's inexperience and naivety was evident and was found by the Tribunal. He also accepted that Mr van der Zanden has experienced the disciplinary process as a salutary one.

[15] However Mr Morris reminded us that, with an obligation to not only protect the public but uphold the standards of the legal profession and thereby maintain public confidence in it, the focus cannot be on the practitioner alone. Mr Morris reminded us that an Officer of the Court has solemn duties and that this practitioner failed in those duties. By attacking prosecutorial integrity and lacking precision in an affidavit to the Court of Appeal he has fallen far below the standards expected of him by his peers and the public.

[16] For Mr van der Zanden Mr Fairbrother QC emphasised the need for rehabilitation. He submitted that this man has much to offer the profession given his life experience and skills gained from many years of military service. He submitted that penalty short of suspension could enhance the practitioner's rehabilitation without denigrating the seriousness of the offending.

[17] We were referred to a number of other penalty decisions but it was accepted that there was nothing directly on point. We note that the decision of *Wood*[2] where there was found to be a deliberate misleading of an Associate Judge at the High Court (a finding of misconduct) a suspension of four months was imposed.

[2] *Canterbury District Law Society v D A Wood* [2009] NZLCDT 11.

[18] We bear in mind the decision in *Daniels*[3] which referred to the principle of least restrictive intervention.

> "[22] It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. In the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practising for a fixed period will be required."

[19] Notwithstanding that principle we consider that there is some behaviour which must be denounced in such a clear way that the Tribunal could not countenance anything less than a short period of suspension from practice. Thus we imposed a suspension of three months upon the practitioner.

[20] As to costs we consider that there ought to be a contribution which reflects the practitioner's means and thus propose to direct that he pays half of the Standards Committee and the Tribunal costs.

[21] A censure of his behaviour is also required together with orders to ensure ongoing mentoring which we consider to be the most important of the orders made in terms of future protection. The orders we make as follows:

1. The practitioner is suspended for three months from 2 August 2014.

2. The practitioner is censured.

3. The practitioner is to pay 50% of the Standards Committee costs of $26,895.63.

4. The New Zealand Law Society is to pay the s 257 Tribunal costs in the sum of $5,155.

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[3] *Daniels v Complaints Committee of the Wellington District Law Society* [2011] NZLR 850 at paragraph [22].

5. The practitioner is to reimburse the New Zealand Law Society in the sum of $2,577 being 50% of the s 257 costs.

6. Pursuant to s 156 Mr van der Zanden is to take advice in relation to the management of his practice from Mr Peter Boylan as directed by Garreth Heyns, Team Leader, Lawyer, Complaints Service, Auckland. And further for a period of 12 months from 25 July 2014 is to undergo practical training or education as directed by Garreth Heyns, which will be in addition to mandatory continuing professional development obligations.

DATED at AUCKLAND this 8th day of September 2014

Judge D F Clarkson
Chair