NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 57
LCDT 013/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**HAWKE'S BAY LAWYERS' STANDARDS COMMITTEE** Applicant
AND	**GERALD GEORGE McKAY** Respondent

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr C Lucas
Mr P Shaw
Mr W Smith
Mr I Williams

HEARING at Auckland

DATE OF HEARING 8 August 2014

COUNSEL
Mr P Collins for Standards Committee
Respondent in Person

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
On Penalty

[1] Mr McKay is a very experienced practitioner who, on 1 May 2014, we found guilty of one charge of professional misconduct.

[2] The full background to this offending is contained in our Liability Decision. In summary, it involved Mr McKay acting for a number of parties in a series of transactions where there were strongly conflicting interests. No independent advice was provided to the complainant. The consequence was that the complainant, Ms H, lost her home, her sole asset.

[3] We found Mr McKay had breached a number of rules of professional conduct "… *to the extent that his conduct amounts to an abuse of his position as a lawyer and a serious breach of his fiduciary duties to Ms H*."[1] We found that Ms H, who was entitled to Mr McKay's "*single minded loyalty*"[2] did not receive it and that Mr McKay "… *had let her down abysmally* …".[3]

[4] As a consequence the Standards Committee asks that Mr McKay be struck from the Roll of Barristers and Solicitors. Mr McKay resists such a harsh outcome towards the end of what he submits is a long and successful career.

[5] Mr McKay is currently subject to an interim order suspending him from practise in relation to other disciplinary charges he faces. [redacted].

[6] The ultimate issue which must be determined by the Tribunal is whether Mr McKay is a "fit and proper person" to continue to practise as a lawyer. That requires a consideration of the following matters:

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[1] Paragraphs [67] and [68] in the decision *Hawke's Bay Standards Committee v G G McKay* [2014] NZLCDT 20.
[2] See footnote 1.
[3] See footnote 1.

1. What is the level of seriousness of the misconduct?

2. Are there aggravating features of the conduct or in relation to the lawyer generally?

3. Are there mitigating matters to be considered?

4. Is strike-off a necessary and proportionate response?

1. What is the level of seriousness of the misconduct?

[7] We consider this misconduct to be at the high end of the scale. Mr McKay's failures to this client were many and obvious. The consequences to her of his failures were devastating. He enabled her home to be purchased by another client at a gross undervalue. Mr Collins submits that this constituted a "total abandonment of professionalism". He went on to submit that it demonstrated *"… a lawyer who strayed so far from the acceptable path of professionalism that he can justifiably be said to have ceased to function meaningfully as a lawyer at all …*". We accept that submission entirely.

[8] Mr Collins submitted that it flowed from that, when taken together with the lawyer's lack of insight into his behaviour, that the "*inevitable conclusion*" was that he was no longer a fit and proper person to practice law.

[9] Mr McKay stated that his intentions had been "*solely to help the lady*". He considered that he had been misunderstood and not fairly listened to. He regarded himself as a good person and competent lawyer and that his note of the original meeting which he contended took 55 minutes and at which he kept careful notes was the accurate version rather than that which had been found by the Tribunal on the basis of the complainant's evidence. He did not make further submissions concerning the offending itself except that he asserted the public did not require protection from him. He considered that he had been the victim of a campaign by the District Law Society and appeared not to regard these charges or the other charges currently faced by him as well motivated or reflective of his high professional standards.

[10] He asserted that the Tribunal had played a "*major part in destroying (his) life*". He stated that he had been "*terribly hard done by*".

2. Aggravating features

[11] There are a number of aggravating features:

(a) The Tribunal's credibility findings

[12] We preferred the evidence of Ms H for the reasons given in our Liability Decision. We considered that Mr McKay attempted sophistry and at times plain untruthfulness to escape facing up to the responsibility of his acting in this position of irremediable conflict. For example he stated that "*I did not have an established and enduring solicitor/client relationship with Mr E … He was a new client to me* …". Mr E was a man for whom he had some years prior to the events in question, formed a company. In addition he had acted for him in respect of an extremely large civil action in which he negotiated for Mr E a settlement obligation of $1.8 million. Thus his evidence that "*I cannot say that I was aware he (Mr E) was in a state of serious financial adversity*" is simply unsustainable.

[13] These findings bring Mr McKay's honesty and integrity into question.

(b) The manner of his conduct to the proceedings

[14] From the outset Mr McKay attempted to delay and indeed was largely successful in ensuring that these proceeding were not heard for almost two and a half years from their inception. This was not simply by mounting a straightforward defence but by engaging in a series of interlocutory applications which were found to be without merit and pursuing them on appeal as far as he was able.

[15] Furthermore his manner of defence involved an attack on the honesty and integrity of his client. He blamed her for what he saw as his own misfortune in facing charges with no insight whatsoever as to his contribution to the complainant's plight. Indeed in the course of the penalty hearing he referred to Ms H's complaint as "*a bit rich*".

(c) Lack of insight

[16] To some extent this crosses over from the preceding matter. The blaming of his client and his complete absence of understanding as to her vulnerability is a serious concern when it comes to consider likelihood of reoffending by the lawyer.

[17] These concerns were heightened by Mr McKay's own submissions on penalty which, while competently and forcefully presented, totally lacked any element of remorse or insight into his failures. They were self-pitying and relentlessly self-absorbed.

(d) Disciplinary history

[18] Finally and by no means least there is the issue of his history of disciplinary findings against him. These begin in 1989 with three charges of misconduct and three further charges of conduct unbecoming, which were found against Mr McKay. While we recognise that is now very dated, the offending having occurred in 1987, the concerning relevance of the conduct is that it also involved a serious conflict of interest.

[19] In October 2004 two further charges were found, one of negligence or incompetence. And finally, at the least serious end of the scale, was a finding in 2010 of unsatisfactory conduct.

3. Mitigatory matters

[20] Mr McKay addressed us at some length about his career including his contribution to the Law Society in a senior role for some five years. He spent some time detailing his firm's collapse, after the Law Society's intervention into his trust account. At the time of the intervention the trust account had a debit balance of approximately $1.4 million (June 2010). However despite this topic being addressed by Mr McKay we put that matter to one side since it is the subject of undetermined charges.

[21] Further in mitigation, Mr McKay referred to his failing health which he clearly considers to have been exacerbated by the stress of the disciplinary [redacted] proceedings against him.

[22] Mr McKay submitted that at 72 years, he would like a "second chance" and an ability to practise his expertise in mediation and other areas.

[23] While Mr McKay can certainly draw some credit for his lengthy career he cannot do so to the extent that he would have been able had he had a clear disciplinary history.

4. Is strike-off necessary?

[24] We were referred to some of the leading authorities. In *Dorbu*[4] the ultimate question was posed as follows:

> "The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must consider whether a lesser penalty will suffice. … Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit …"

[25] And further in *Hart*[5]

> "… 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 a practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
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> In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with the acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in future.

[4] *Dorbu v New Zealand Law Society* [2012] NZAR 481 at [35].
[5] *Hart v Auckland Standards Committee No. 1* [2013] 3 NZLR 103 at [185]-[189].

> For the same reason the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.
>
> On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future."

[26] Finally the frequently cited decision of *Bolton*[6] is relevant in considering this matter:

> "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 solicitor's disciplinary tribunal. … The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgement, to be made by the Tribunal as an informed and expert body on all the facts of the case …".

[27] We are well aware that the ultimate sanction of strike-off is an extremely serious step to take. It is our unanimous view, having regard to the seriousness of the offending, and the further factors referred to as aggravating, that no lesser penalty will suffice to protect the public and the reputation of the legal profession.

[28] We can have no confidence that Mr McKay would not, if able to continue to practise, repeat his actions, given his sense of self-righteousness and justification for his actions.

[29] In all of the circumstances we consider strike-off is a proportionate and necessary response.

Costs

[30] Mr McKay's conduct of these proceedings has undoubtedly contributed to the large costs incurred by the Standards Committee in this prosecution. The Standards Committee seeks full recovery of their costs of $72,727.00.

[31] Mr McKay has addressed us on his level of impecuniosity. He says he has no assets remaining but as far as we are aware is not a bankrupt.

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[6] *Bolton v Law Society* [1994] 2 All ER 486, at 491.

In any event we consider it is proper to make an order for costs against him, albeit one which may be difficult to recover.

Orders

1. There will be an order striking the practitioner Gerald George McKay from the Roll of Barristers and Solicitors.

2. We make an order that Mr McKay contribute $70,000 to the Standards Committee costs.

3. The New Zealand Law Society is to pay the costs of the Tribunal in the sum of $14,812.

4. Mr McKay is to reimburse the New Zealand Law Society in the full sum of $14,812.

DATED at HAWKE'S BAY this 18th day of September 2014

Judge D F Clarkson
Chair