NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 6
LCDT 012/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**DAVINA VALERIE MURRAY** of Auckland, former Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms S Hughes QC
Ms C Rowe
Ms M Scholtens QC
Mr W Smith

HELD at Specialist Courts and Tribunals Centre, Auckland

DATE 26 February 2015

DATE OF DECISION 16 March 2015

APPEARANCES
Mr M Treleaven for the Standards Committee
Mr W Pyke for Ms Murray

REASONS FOR PENALTY DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] On 26 February 2015, this Tribunal ordered that Davina Murray's name be removed from the Roll of Barristers and Solicitors. We reserved our reasons for making that "order of last resort". This decision provides those reasons.

[2] Any penalty consideration must start with the seriousness of the conduct in question.[1] We then consider matters of mitigation and aggravation in relation to the conduct and to the practitioner.

[3] We have regard to the purposes of disciplinary penalties, in relation to these circumstances and this practitioner. Finally, the Tribunal must consider whether it has reached the view, unanimously, that the practitioner is no longer a fit and proper person to be a lawyer and an officer of the court, with the privileges and responsibilities that status entails.

Conduct

[4] Our decision of 16 December sets out the background, leading to Ms Murray's conviction and sentence for smuggling items into Mt Eden Prison, to a high security prisoner who was serving a term of preventive detention.

[5] In our decision we referred to the seriousness of this conduct.[2] We noted that while the conviction itself was only for a summary offence *"… from a professional disciplinary point of view, it goes directly to the heart of the standing of the profession in the community*". We noted this view was shared by the District Court Judge who tried the matter, and the High Court Judge who presided on appeal.[3]

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[1] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.
[2] Paragraphs 35-46 *Auckland Standards Committee No. 1 v D V Murray* [2014] NZLCDT 88.
[3] *New Zealand Police v Davina Murray* CRI-2013-004-003095, Auckland District Court, Collins DCJ, 1 August 2013 and 1 October 2013 (sentence). *Davina Murray v New Zealand Police* [2014] NZHC 337, Venning J.

[6] The Standards Committee submits that it is the type of conviction referred to in the *Ziems* case in these terms:[4]

> "It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands."

[7] It is submitted that the circumstances of this conviction lead to the conclusion that Ms Murray is not a fit and proper person to practice the law. Further, it is submitted "*if the conviction is not at that level then it is necessary to consider the conduct underlying the conviction and whether it discloses "human frailty" warranting the person's disqualification from professional life*".

[8] For Ms Murray, Mr Pyke reminded the Tribunal that the conviction was for a summary offence in which culpability, as found by the District Court, was "*neither at or near the most serious end of the scale for such an offence*". We were reminded of the (with respect, merciful) sentence of 50 hours community work.

[9] Furthermore, Mr Pyke reminded us that this was a single incident of offending which, despite its aggravating features of undermining confidence in the profession, particularly within the prison setting, was not a charge that related to service to clients.

[10] In oral submissions Mr Treleaven submitted that the context of this serious offending implied a "defect in character" in the *Ziems* sense such as to satisfy the test that Ms Murray is not a fit and proper person. We were reminded of the unchallenged evidence of Mr Sherlock, Manager of the Auckland Prison:

> "It is the combination of Ms Murray's actions by introducing dangerous items into the prison, and doing so by taking advantage of her privileged status as a lawyer, which in my view made her offending particularly grave. Although the prison authorities are alert to the possibility of smuggling by ordinary visitors, I did not expect that a lawyer would intentionally compromise prison security in this way."

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[4] *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298.

[11] There is considerable force in this view and in the submission made by the Standards Committee. With that in mind we turn to consider aggravating and mitigating factors:

Aggravating factors

The Abuse of a Privileged Position as a Lawyer

[12] Because we have taken this into account in the first step, of assessing the seriousness of the practitioner's conduct, we do not propose to take further account of it as an aggravating feature.

Conduct of the Criminal Proceedings

[13] As recorded in our liability decision, the manner of Ms Murray's conduct of her trial is relevant to whether she is a fit and proper person. We refer, not just to the suggestions that she was at times discourteous and unprofessional in her manner of self-representation, but more importantly that she falsely accused two prison officers of planting evidence on the prisoner. This was the form of defence advanced by her and evidence was called from the prisoner to support this allegation. Throughout, Ms Murray knew this to be completely untrue, because as established by the evidence, and later acknowledged by her, she had purchased the cell phone and other items herself and had supplied them to the prisoner.

[14] As an officer of the Court, to allow false evidence to be knowingly put before the Court is a very serious breach of ethics. It is probably one of the most reprehensible forms of conduct which can be undertaken by any trial lawyer.

[15] The system of criminal and civil justice relies on the Courts being able to have absolute confidence in the integrity of counsel appearing. Ms Murray has demonstrated that no such confidence can be reposed in her.

[16] We were referred by the Standards Committee to an Australian case which bore some similarities to the present matter, namely *Pepe.*[5] In that matter a practitioner was convicted of perverting the course of justice in circumstances where

[5] *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39 (Supreme Court of Western Australia, 25 February 2009).

she had a personal relationship with a prisoner client, as did Ms Murray. After pointing out that the practitioner was:

> "… insensitive to and had disregarded serious professional conflicts of interest. This too reflects adversely upon her fitness to practice. That she got herself into a position of acting professionally for the man who was her partner at the time, and with whom there appears to have been a most unsatisfactory and dysfunctional relationship; that she only recognised the need to engage other more senior counsel to appear with her, after being strongly advised to do so by professional colleagues; and that she would put out a large amount of her own money for the engagement of the senior counsel; all show how severely her position was compromised and, more importantly, how inadequate in these respects was her personal professional judgment".

[17] Even more relevantly, in relation to the Court's need to repose trust in counsel the Court went on to say:[6]

> "… The unswerving performance of professional obligations of legal practitioners, and the need for the courts and the profession to trust the integrity of a practitioner is extremely important because, in many cases, in the nature of advice given, submissions made or evidence disclosed, there will be little if any effective supervision of the conduct of a practitioner **as many of those duties are performed under privilege**. The need for such trust to be extended with confidence to a practitioner, by fellow practitioners, courts and the public, is so great that it forms an essential part, not only of the practice of the law, but of the administration of justice. If conduct is discovered, or defects are exposed, which reveal that such trust cannot, or cannot confidently, be extended to the person concerned, then by that very fact the person can no longer be regarded as a fit and proper person to discharge the serious responsibilities of practice." (emphasis added)

Conduct of the Disciplinary Proceedings

[18] As to the conduct of the disciplinary proceedings the Hart[7] decision held:

> "… 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 acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in future".

[19] The Standards Committee submit that lack of insight is evidenced by Ms Murray's challenge of the proof of her "conviction" at the hearing of this charge. Mr Pyke reminded us that this approach was taken with the support of counsel and that "*lawyers charged must be free to pursue lines of legal argument or challenge even if there is not a high certainty of success*". Mr Pyke reminded us that "*the fear*

[6] At paragraph 48.
[7] See footnote 1 at 185-189 [affirmed].

of being penalised for challenge or legal argument would arise in the minds of lawyers charged …". Although Ms Murray's change of stance was a very last minute one (six days before the hearing and almost one year after the charges were laid), we do not place much weight on the approach taken. We accept that it took some time for Ms Murray to engage legal counsel and that she ought not to be particularly penalised for her lateness in filing a formal response to the charges.

[20] However we do note that, while conducting the proceedings in person, she showed, once again, a significant ethical blind spot. This occurred on the occasion when she invited the prisoner, Liam Reid, to join a pre-hearing telephone conference with the Tribunal Chair, without informing either the Chair or other counsel of his presence. This conduct only came to light when the Corrections Department sent a recording of the conversation to the Tribunal. When the Chair sought an explanation for this occurrence, Ms Murray's response, instead of an apology was to demand that the Tribunal provide her with "*the legal provisions that gave rise to (the Tribunal) being willing to accept that the disclosure of the information from the Department of Corrections met the legal test to enable the Department to make this disclosure*." We note in Mr Pyke's submission Ms Murray acknowledges her fault on this occasion but offers no apology for it.

Previous Offending

[21] There are three adverse findings against Ms Murray in the space of a five-year career. These findings, and their nature, to which we will shortly refer, are not only an aggravating feature but have considerable relevance to the assessment of proper penalty when considering protection of the public and likelihood of rehabilitation.

[a] The first involved Ms Murray receiving payment of fees of $2,300 directly from a client (thus breaching the intervention rule) and then failing to obtain an urgent order as instructed. She was found to have breached her obligations to have acted competently and in a timely fashion and was ordered to refund the fees and pay costs to the Standards Committee.

[b] The second, a very serious matter, involved a finding that not only did Ms Murray act for her partner in a domestic-related matter (Relationship Property proceedings) while in an intimate relationship with him but that

when their relationship was ended she communicated directly with her former partner's wife (who was represented by counsel) and disclosed confidential information to her against her client/former partner's interests. She further went on to engage in a similar breach of confidence when speaking with counsel for the former partner's wife. She was censured, fined $5,000 and ordered to pay costs. We consider that Ms Murray was extremely lucky for that matter not to have been referred to the Tribunal by way of charges, involving as it did a serious breach of confidence in aggravating circumstances.

[c] In relation to the same "client", a further finding of unsatisfactory conduct was made against Ms Murray when, shortly following the suicide of her partner, for whom she had previously acted, she sent a fees account to the estate in the sum of $67,500. In finding unsatisfactory conduct the Standards Committee noted there were numerous emails and details of communications in which Ms Murray had made it plain that she was providing legal services to her then partner at no cost. The Standards Committee fined Ms Murray $10,000 and ordered her to pay costs and to cancel her fee.

[d] We further note the tragic circumstances of this man's death, and its reported effects upon Ms Murray, were relied on by her as a mitigating feature in her District Court sentencing.

[22] All three of these decisions were appealed by Ms Murray to the Legal Complaints Review Officer ("LCRO") and were upheld in all but minor respects. Ms Murray's conduct in attempting to delay or thwart the process of review by the LCRO followed a similar pattern of lack of co-operation with the disciplinary process. The appeals were lodged by her despite her having taken all possible steps to delay the Standards Committee processes by seeking numerous extensions, then in the end not providing the Standards Committee with any material or appearing to explain herself.

[23] Again, we note the final Standards Committee determination involved very serious conduct which, particularly in combination with the breach of confidence, might properly have been referred to the Tribunal.

Mitigation

[24] In relation to acknowledgement of responsibility and remorse Mr Pyke produced by consent, a copy of the letter which had been provided to His Honour Judge Collins for the District Court sentencing. In it Ms Murray stated her belief that she now has clear insight into her offending and apologised to the Court for her previous "attitude". She expressed remorse for her offending and apologised to the Department of Corrections for "infringement of their rules". We note that she did not apologise to the Corrections officers whom she had falsely accused.

[25] This letter was the subject of comment by His Honour Venning J:[8]

> "It was only after the charge had been found proved that she saw fit to write to the Court acknowledging her guilt. However, even then, I consider the letter to be in somewhat guarded terms and clearly written with a view to pursuing an application for discharge."

[26] Ms Murray's submissions of remorse and the suggestion that some weight ought to be placed on this letter, despite His Honour's (with respect) wise comments appeared somewhat thin in the current setting, in the light of her failure to appear at her own penalty hearing. Her absence was unable to be explained by her counsel.

Purposes of Penalty

[27] The primary purposes for penalty necessarily flow from the purposes of legislation, namely the protection of the public and the upholding of professional standards such that the public's confidence in the profession is maintained and promoted. In relation to protection of the public, an assessment of risk of reoffending may need to be undertaken.

[28] Further purposes include rehabilitation of the practitioner, in order that hard earned and valuable skills might not go to waste.

[29] General and specific deterrence may also be factors in a given case. And finally, while punishment is not a primary purpose, it is accepted that there is of necessity a punitive element in many of the penalty outcomes.

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[8] See footnote 3, at paragraph [36].

Was Strike Off Necessary?

[30] With these purposes in mind the Tribunal is guided by the dicta of recent cases which have discussed penalty at length such as *Hart,*[9] *Dorbu*[10] and *Daniels.*[11]

[31] *Daniels* made it clear that the general sentencing principle of the "least restrictive outcome" is a proper one in disciplinary proceedings.

[32] Mr Pyke attempted to persuade the Tribunal that the maximum period of suspension of three years, coupled with an order that Ms Murray not practice on her own account was capable of satisfying the statutory purposes of penalty.

[33] For the Standards Committee it was submitted that nothing less than striking off would be adequate having regard to the seriousness of the offending and the aggravating features to which we have referred and the "*obvious absence of any contrition or remorse about the damage her offending had caused to the reputation and standing of the legal profession in general and the criminal defence (Bar) in particular*".

Decision

[34] Assessing all of the above factors and in particular having regard to our public protection role, the Tribunal was strongly of the view that Ms Murray is not a fit and proper person to continue in legal practice. The entire picture presented by her offending, her subsequent conduct and her previous disciplinary history is of a practitioner with little or no understanding of her ethical obligations to clients, her profession or the institutions of justice. For these reasons we made the order striking Davina Murray from the Roll of Barristers and Solicitors.

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[9] See footnote 1.
[10] *Dorbu v New Zealand Law Society* [2012] NZAR 481.
[11] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

Costs

[35] Ms Murray is a bankrupt and was legally aided in the disciplinary proceedings. For that reason no order for costs was sought against her.

[36] There will be an order against the New Zealand Law Society in respect of the Tribunal costs, pursuant to s 257, in the sum of $9,420.

DATED at AUCKLAND this 16th day of March 2015

Judge D F Clarkson
Chair