NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 60

LCDT 007/14

BETWEEN	**STANDARDS COMMITTEE OF THE OTAGO BRANCH OF THE NEW ZEALAND LAW SOCIETY** Applicant
AND	**ANJA KAREN EVELYN KLINKERT** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Ms S Hughes QC

Mr W Smith

Mr S Walker

HEARING at Dunedin

DATE 18th August 2014

COUNSEL

Mr T Mackenzie for the Standards Committee

Ms J Ablett Kerr QC for the Practitioner

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

[1] The practitioner has admitted a charge that having been convicted of an offence punishable by imprisonment, the conviction reflects on her fitness to practice, or tends to bring her profession into disrepute pursuant to s 241(d) of the Lawyers and Conveyancers Act 2006 ("the Act").

[2] The charge arises out of a conviction of 10 October 2006 that, contrary to the Crimes Act 1961, the practitioner, with intent to obtain a pecuniary advantage, dishonestly and without claim of right used a document.

[3] The Tribunal heard submissions from counsel as to penalty on Monday 18 August 2014 and then made the following determination:

(a) That the practitioner be suspended for six months commencing at 5 pm on Saturday 23 August 2014.

(b) That she pay the costs of the Law Society in the sum of $9,000.00.

(c) That she refund the Law Society, in full, in respect to the s 257 costs of the Tribunal.

[4] This judgment contains the reasons for the penalty imposed.

[5] The practitioner has admitted the underlying facts relating to the charge, which in summary are:

(a) In 2006 the practitioner was acting for the parents of J. J held powers of attorney for his parents (the Zs). Previously, in 2005 the parents had applied to Work and Income New Zealand ("WINZ") for a Residential

Care Subsidy (the "Subsidy") that was declined because their assets exceeded the relevant statutory threshold.

(b) The practitioner was instructed by J to pursue an action against a Dunedin firm of Solicitors who had undertaken asset planning for his parents, which allegedly had failed to place them in the financial position promised.

(c) J placed $30,000.00 of Zs' funds (the "funds") with the practitioner to cover projected litigation costs. The practitioner placed those funds in her trust account before moving them to an interest bearing deposit ("IBD") several days later.

(d) In June 2006 the practitioner completed and forwarded an application for a Residential Care Subsidy (the "application") to WINZ on behalf of Mr Z.

(e) That application was accompanied by a letter which advised WINZ that a QC had been instructed to pursue legal action against the Zs' former legal firm, concluding: "*To that end we retain $30,000.00 in our trust account on account of legal fees and disbursements*."[1]

(f) In September 2006 WINZ declined the application, pointing out that the funds held in the practitioner's trust account as of June 2006 were an asset of the Zs, thus included when calculating total assets against the relevant threshold to qualify for the subsidy.[2]

(g) In response the practitioner created a document *"File Statement Between the Date 1 AUG 2005… 10 OCT 2006"*[3] that falsely showed the Zs' funds moving, on 2 May 2006, from the trust account to the firm's

[1] Bundle of documents at 163.
[2] Bundle of documents at 183.
[3] Bundle of documents at 188.

[trading] account, as payment of fees. The practitioner faxed this file statement to WINZ on 10 October 2006.[4]

(h) WINZ responded on the same day advising that the 'printout' was insufficient for their purposes and asked for invoices of legal fees charged against the $30,000 by the practitioner.

(i) On the same day the practitioner created an invoice dated 2 May 2006 in the total sum of $30,000.00, in the name of the Zs, and faxed this invoice to WINZ.

(j) On 11 October WINZ requested clarification from the practitioner about how much of the $30,000.00 was spent on legal fees as at the application assessment date of 6 June 2006, to which the practitioner responded on 25 October 2006, stating that the invoice related to legal fees incurred at 2 May 2006, and further that all of the $30,000.00 was spent before the application was made.

(k) The above response to WINZ was false and in making this statement the practitioner knew that it was false and that as a result of the falsity the Zs may or would become eligible for the subsidy.

(l) On or about 25 October the practitioner transferred the $30,000.00 to her firm account in payment of the invoice.

(m) On the same day WINZ granted the Zs' application for the subsidy.

(n) After a complaint from J and an investigation by the Standards Committee revealed the above sequence of events, the file was referred to the New Zealand Police.

(o) On 10 December 2012 the practitioner pleaded guilty to one charge of using a document with intent to obtain a pecuniary advantage in

[4] Bundle of documents at 187.

contravention of s 228(b) of the Crimes Act 1961, a charge which carried a maximum penalty of seven years imprisonment.

(p) The practitioner was convicted of the offence on 6 March 2013 and was subsequently fined $750.00.

Submissions for the Respondent

[6] For the practitioner it was submitted that her actions in dealing with WINZ in October 2006 could be regarded as a "one-off" event in an otherwise exemplary career spanning nearly 19 years, including the eight years since the offending. She had accepted that her conduct was unlawful and her behaviour in 2006 totally unacceptable.

[7] The practitioner's position was that at the time of creating the false file statement she believed she had made a mistake by banking fees in the wrong account and could set this straight by altering the file statement to show the funds sitting in the firm's account as proof that the monies were spent. She says that as at 10 October 2006 some legal fees had been incurred in the case but not invoiced.

[8] The practitioner, counsel said, was genuinely remorseful and had deposed that it had been a hugely shameful and humiliating experience for her to face up to what she did. Counsel points to references filed at sentencing in the criminal trial[5] and before this Tribunal, as attesting to both the practitioner's remorse and otherwise good character.

[9] Counsel submitted that the practitioner had contributed in very significant ways to the benefit of the community, as reflected in the numerous references provided, giving of her time voluntarily to various charitable trusts, including the Work Opportunities Trust and the Community Law Centre. She had also contributed as a board member of the Dunedin Fringe Festival.

[10] Counsel submitted that the practitioner's exceptional family background and the emotional pressure that she felt under was a result of her personal connection

[5] Bundle of documents at 76-103.

with the Zs' who were the grandparents of the child the practitioner, her partner, and J had jointly raised, and that this was a significant contributing factor to her conduct in October 2006. Counsel referred the Tribunal to a letter from Dr Suhari Mommsen-Bohm of 28 February 2012[6] in support of that submission.

[11] Counsel for the practitioner drew the Tribunal's attention to the decision in *Sorensen v New Zealand Law Society (Auckland Standards Committee No. 2)*[7] where the High Court held at [43] that:

> "Despite the seriousness of the Appellant's misconduct, I am satisfied that a lesser penalty than an order to strike off is sufficient to protect the public in the future. The Appellant's lack of disciplinary history and the evidence contained in the references indicate that this was a "one off" incident."

Counsel said further that *Sorensen* provides a very useful discussion of the appropriate considerations where there has been proven dishonesty and the tension between justice to the individual and the need to uphold standards.

[12] *Sorensen*, counsel for the practitioner submitted, also confirms that:

> "[22] The Tribunal may only make an order striking off a practitioner's name if:
>
> (a) it is satisfied that the practitioner "is by reason of his or her conduct, not a fit and proper person to be a practitioner". I accept the submission of counsel for the Appellant that this is an assessment to be made as at the time the order is made."

Therefore, said counsel, the fact that the practitioner had practised without complaint for nearly eight years since the offending and had been able to adduce current references in support of the way in which she conducted herself, was evidence that refuted any contention that she was not a fit and proper person.

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[6] Bundle of documents at 84-85.
[7] [2013] NZHC 1630.

[13] The case of *Otago Standards Committee v Davidson*[8], at [40], referred to in the *Sorensen* decision was, said counsel for the practitioner, further support for the contention that dishonesty need not in all cases result in a strike-off.

[14] In conclusion, it was submitted on behalf of the practitioner that:

(a) A "strike-off" penalty was unnecessary to protect the public and would be disproportionate in all the circumstances of the case.

(b) The offending was not symptomatic of some greater evil and the practitioner's general honesty and integrity was not an issue.

(c) The Sentencing Judge in the criminal proceedings saw the offending as moderate;

(d) The practitioner showed insight into her offending.

(e) At the time of the offending the practitioner was a sole practitioner working on her own in isolation. Since 2012, while still a sole practitioner, she works in a community of lawyers with access to support and collegiality.

(f) The practitioner has been open and frank with her colleagues and has actively sought regular supervision and support from appropriate health care providers.

(g) The appropriate penalty is one of a short period of suspension under s 242(1)(e) or s 242(1)(a) of the Act.

Submissions for the Standards Committee

[15] The position of the Committee, counsel submitted, was that the practitioner placed the fees on trust intentionally and later was dishonest in her dealings with

[8] [2012] NZLCDT 39.

WINZ when she successfully portrayed to them that the funds had never been in trust and were taken as fees from the outset.

[16] Counsel points to the affidavit evidence of Mr Spencer of WINZ who stated that he trusted the practitioner's word given she was a lawyer. The practitioner committed a gross breach of this trust, said the Committee, by firstly submitting the 'file statement', she perpetuated it with the invoice, and committed to it with her letter of 25 October 2006. That conduct resulted in the practitioner admitting criminal dishonesty and must have brought disrepute to the profession and must call her fitness to practice into question, despite the fact that the original conduct was becoming historical.

[17] The Committee submitted that accordingly, on the basis of the gravity of the offending and the lack of insight shown, the practitioner was not currently fit to practise and that striking-off was the appropriate order and the penalty sought.

[18] As a starting point to penalty the Committee cited the oft quoted passage in *Bolton v The Law Society*[9] , where at [491] Sir Thomas Bingham MR said:

> "…It is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness……
>
> …..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.

And at [492]:

> "…the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth….a member of the public….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 inspires".

[9] [1994] 2 All ER 486.

[19] In respect to the protective jurisdiction of the Tribunal, the Committee cited *Sisson v The Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society*[10] where the Court said:

> [45] "It is well recognised that the jurisdiction of the Tribunal is protective. That is, there is a public interest in the maintenance of high standards given that practitioners must be trustworthy; competent to uphold the ethical obligations to which they are subject".

[20] Counsel for the Committee, in respect to assessing the gravity of the Practitioner's conduct directed the Tribunal's attention to *Dorbu v The New Zealand Law Society*[11], and in respect to fitness and sanctions *Daniels v Complaints Committee 2 of the Wellington District Law Society.*[12]

[21] Finally the Committee submitted that in the event the Tribunal disagreed that striking-off was the appropriate penalty, an alternative penalty would be to impose a period of suspension, such as that imposed in the case of *Sorensen* where the dishonesty was considered as a one-off incident.

Discussion

[22] Dishonesty in the use of a document on the part of a legal practitioner is a matter that the Tribunal takes very seriously. To maintain the collective reputation of their profession, legal practitioners must be as good as their word; their representations and undertakings relied upon, and able to be acted upon, with total confidence. There could be no doubt that the conduct of the practitioner in 2006 both reflected on her fitness to practise at that time, and tended to bring her profession into disrepute. Dishonesty on the part of a legal practitioner also breaches a fundamental obligation; that of upholding the rule of law and facilitating the administration of justice.

[23] Irrespective of motive, the practitioner in this case wilfully created a document (a file statement) knowing that it was false and knowing that a third party, in this case a government agency, would act upon it as if it were true. The practitioner deposed

[10] [2013] NZHC 349.
[11] 2012] NZHC 564 at [35].
[12] [2011] 3 NZLR 850 (HC) at [32-34].

that at the time of her conduct she thought she had made a mistake by banking the fees into the wrong account and could fix that by altering the file statement. The Standards Committee said that there was no mistake and that the "mistake" claim is made in hindsight to justify the practitioner's actions.

[24] The Tribunal noted, as part of the evidence received, the sentencing notes of His Honour Judge Crosbie in relation to the practitioner's criminal conviction where the Court rejected the practitioner's "mistake" contention[13]. The Court was also concerned that the practitioner regarded the funds, originally sitting in the firm's trust account, as "spent" on the basis that they were for future potential fees[14]. We also note that J deposed that he had never authorised the practitioner to take the funds as fees[15], and that the practitioner acknowledged that she had not asked J for the authority to transfer the funds from one account to another.[16]

[25] On its view of the evidence, the Tribunal agreed with the Standards Committee submission that there was no mistake on the part of the practitioner when she banked the funds into her firm's trust account. The Tribunal came to the conclusion that the conduct of the practitioner was motivated by a misplaced sense of loyalty or obligation to the Zs, who she regarded as family.

[26] The Tribunal also agreed with the Standards Committee that a starting point for the sanction of conduct involving dishonesty, as seen in the practitioner's conduct, would likely be strike-off and the Committee referred us to the well - reviewed excerpt from *Bolton* dealing with lapses in standards of conduct.

[27] In determining the degree to which the practitioner's fitness to practise was affected by the conduct, together with the extent of any disrepute brought upon the profession, we were referred by Counsel for the Committee to *Daniels*[17] where the Court stated at [32] and [34]:

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[13] Bundle of documents at 132 [48].
[14] Bundle of documents at 133 [50] to [52].
[15] Affidavit of J dated 9 May 2014 at [4] to [6].
[16] Affidavit of the Practitioner dated 4 June 2014 at [38].
[17] See above 12.

> "[32] A Tribunal, when determining ultimate fitness to remain in practice, whether limited by suspension, or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it is the obvious absence of a mitigating factor and relevant to balancing matters of character.

And

> [34] In considering sanctions to be imposed upon an errant practitioner, a Disciplinary Tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not, treat lightly serious breaches of standards.

And *Dorbu*[18] at [35] where it was said:

> 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 also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing."

[28] The Tribunal accepted counsel for the practitioner's submission that *Sorensen* confirmed that the assessment of whether the practitioner was a fit and proper person to hold a practising certificate is an assessment to be made at the time of making an order.

[18] See above 11.

[29] Council for the practitioner also pointed to reference, in the *Sorensen* decision, to *Otago Standards Committee v Davidson*[19] as further support for the proposition that dishonesty need not result in strike-off; where at [40] the Court said:

> "[40] In Davidson, being the first case to which counsel for the Appellant referred me, the practitioner inserted a false date of execution in a will, in the belief that by doing so she was limiting scope for questions to be raised as to the testamentary capacity of the testatrix. The insertion was deliberate and made with the intention of misleading, amongst others, The Public Trust. The Tribunal suspended the practitioner for six months. It also ordered her to pay the costs of the Society's Otago Standards Committee and to reimburse the Society for the sum it was required to pay to the Crown pursuant to s 257 of the Act."

[30] The Standards Committee acknowledged in its submission to the Tribunal the "historical" nature of the conduct, which was 2006, but nevertheless continued to have some concerns about the practitioner's fitness to practise.

[31] The Tribunal is familiar with the decision in *Davidson* and noted that there were similarities between *Davidson* and the instant matter. Both practitioners were experienced; both had a "clean record" up until the time of their single instance of misconduct; both acted in a misguided attempt to help their clients or the family of clients; neither practitioner acted for personal gain at the time of their misconduct; both practitioners were under forms of stress in their lives; neither practitioner had any disciplinary history prior to their respective conduct.

[32] As with *Davidson*, this Tribunal was of the opinion that a period of suspension was warranted given the gravity of the conduct and we considered that a start point of twelve months was indicated, discounted by the particular circumstances of this matter.

[33] The Tribunal recognised that almost eight years had passed between the conduct the subject of the charge, and the disciplinary hearing. We accept that during that time the practitioner had made changes to the environment in which she practiced, by working independently but in premises with peer support where there

[19] [2012] NZLCDT 39.

was also collegiality. The practitioner has had, in the eight intervening years, a clean record in the provision of regulated services.

[34] The practitioner said that prior to and up to the conduct, she had practiced law in a state of isolation and had a range of personal psychological issues stemming from abandonment and separation. The practitioner provided a letter in support from Dr Suhari Mommsen-Bohm, a Psychotherapist dated 28 February 2012[20]. The letter is not a psychological report or evaluation.

[35] The practitioner had been practising law since 1996 and had been a sole practitioner since 2002. She deposed that throughout her 18 years of practice there had been no other complaints made against her.

[36] The Tribunal accepted the practitioner's submission that the conduct that occurred in 2006 was a one-off instance and in our view unlikely to be repeated given the process the practitioner had been through and the new work environment she described, with peer support and collegiality.

[37] The practitioner provided the Tribunal with no less than five affidavits and three written references in support of her reliability, honesty and character. Six of the testimonials are from practising barristers and solicitors who have known the practitioner professionally for periods ranging up to 20 years; are familiar with the conduct the subject of this decision; have experience of working with the practitioner in the intervening years; and are nevertheless confident and happy to continue in their association. These testimonials assisted the Tribunal in determining the practitioner's current circumstances, professional demeanour, and fitness to practise.

[38] Counsel for the practitioner also referred us to 14 references from the material in support of a discharge without conviction application, of May 2012. This material, of which we took note, while commendable, is of little weight in our considerations because it focuses on the criminal aspect of the conduct rather than the professional disciplinary context of fitness to practise.

[20] Bundle of documents at 84.

[39] The practitioner provided the Tribunal with a statement of assets and liabilities which was of assistance to us in determining costs orders.

[40] It was the view of the Tribunal, taking all the evidence into account, that a six month suspension from practice was required to address the seriousness of the practitioner's conduct and we made that order, and orders relating to costs, as recorded at [3] above.

[41] The costs of the Tribunal pursuant to s 257 are certified as being $6,021.

DATED at AUCKLAND this 26th day of September 2014

BJ Kendall
Chairperson