NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 63

LCDT 036/13

UNDER	the Lawyers and Conveyancers Act 2006
IN THE MATTER	of disciplinary proceedings under Part 7 of the Act
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 4** Applicant
AND	**STEPHEN POTTER** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING at Auckland

DATE OF HEARING 14 August 2014

APPEARANCES

Mr L Clancy for the Standards Committee

Mr S Potter, the Practitioner

RESERVED DECISION GIVING REASONS
FOR DECISION AND ORDERS OF 14 AUGUST 2014

[1] This decision concerns the penalty imposed on Stephen Potter, who has admitted a charge of misconduct in his professional capacity.

[2] The conduct falling for consideration resides in three levels of failure:

1. Failure to cooperate with the New Zealand Law Society ("NZLS") inspectorate which attempted to undertake a "new practice" review;

2. Failure to properly respond to the Lawyer's Complaints Service notice requiring production of trust account records for inspection;

3. Failure to fully adhere to an undertaking given to this Tribunal as to monthly production of documents to the inspectorate.

[3] The Standards Committee submit that the conduct is so serious as to require suspension from practice of 9 to 12 months. They further ask that Mr Potter is prevented from practice on his own account for the time being.

[4] Mr Potter, while admitting the charge because he contends he has "no appetite for a fight" with his profession, disputes his failures have been so extensive. Notwithstanding this, he has voluntarily ceased practice as from 1 July 2014 pending this hearing.

[5] Mr Potter disputes the level of costs as partly unnecessary, but says he will accept whatever penalty the Tribunal considers appropriate.

[6] Orders were announced after the conclusion of the hearing and reasons reserved.

[7] The issues the Tribunal had to resolve before making orders were:

1. Where does this conduct sit on the continuum of seriousness?

2. Are there aggravating features?

3. Are there mitigating features?

4. Do the principles underlying penalty considerations require a suspension from practice to be imposed?

5. Does the protection of the public require this practitioner to be supervised in his practice?

6. How should costs be apportioned?

Background

[8] The practitioner opened his trust account on 24 May 2013. From August onwards the delegated inspector, Mr Maffey made attempts to meet with Mr Potter to carry out a new practice inspection. His attempts to contact the practitioner and the practitioner's failure to engage in the process, repeatedly cancelling appointments is summarised by Mr Maffey as follows:

> "In all my 15 years as an NZLS inspector, during which time I have carried out over 800 inspections or reviews, I have never encountered such difficulty in arranging a visit."

[9] By October Mr Potter was advised that he was in breach of Regulation 29.[1] In late October the matter was referred to the Standards Committee. Mr Potter was required by the Standards Committee to provide his trust account records by 1 November. When the practitioner failed to do so, the Standards Committee determined to bring the matter before the Tribunal.

[10] On 2 December the Tribunal was asked to suspend the practitioner from practice until he had complied with the requirements of the inspector.

[11] During a telephone conference Mr Potter undertook to the Tribunal to provide certain material by 6 November. Not all of that material was provided and in February the Standards Committee pressed again for an interim suspension order. The practitioner advised of the health problems and other difficulties faced by him

[1] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

and was given a final opportunity to provide material to the Standards Committee. When he did not fully comply, an order was made on 28 February that he be suspended from practice on an interim basis.

[12] Further communication continued between the practitioner and the Standards Committee and on 20 March as a result of considerable compliance by the practitioner and on the basis of further undertakings given to the Tribunal, the suspension order was revoked. The substantive charge was timetabled to hearing and the practitioner acknowledged and accepted the charge faced by him.

[13] On inspection of the practitioner's trust account, the inspector did not have any serious concerns which would raise concerns as to dishonesty or misuse of client funds.

[14] We address the issues in turn.

Issue 1

[15] This is moderately serious misconduct, but not as to raise concerns as to honesty of the practitioner. We also note no client was harmed by the practitioner's actions.

[16] It was the Tribunal's sense that there was some level of belligerence or block in understanding on the part of the practitioner. While professing cooperation and acceptance of responsibility, each time a demand was made of him, he seemed to "come up short" of full compliance. We do not however regard this to be at the level of non-compliance referred to in the *Hart*[2] decision:

> "[108] Furthermore, we consider any refusal to comply with a lawful requirement made by an investigating committee to be a potentially serious matter. Any suggestion to the contrary would not be consistent with the approach taken recently in this Court …"

[17] The Court then went on to refer to the *Parlane*[3] decision where His Honour Cooper J said:

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[2] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83.
[3] *Parlane v The New Zealand Law Society (Waikato/Bay of Plenty Standards Committee No. 2)* HC Hamilton, CIV 2010-419-1209, 20 December 2010.

> "[108] … I consider that legal practitioners owe a duty to their fellow practitioners and to the persons involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act."

And

> "[109] … The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification …"

[18] This is not a situation of a practitioner who was being deliberately obstructive but it certainly reflected a failure to prioritise those matters of practice management considered important by the profession in order to protect the public.

Issue 2 - aggravating features

[19] While at all times courteous, it has to be noted at times the practitioner failed to comply with directions and indeed filed no formal response to the charge faced by him. Nor did he file an affidavit. He simply appeared on the day and presented his arguments. We considered he failed to accord a proper level of seriousness to his failure to comply with the undertaking given to the Tribunal. He seemed to think he was no longer bound once the Law Society indicated criticism of what he had supplied and its intention to continue the proceedings.

[20] We consider he lacked insight into his own contribution to his problems and that was a real concern to the Tribunal.

Issue 3 - mitigating features

[21] We note there was no loss to clients. There was no overdrawing of the trust account and no funds were invested other than in accordance with instructions.

[22] Furthermore there was no previous disciplinary history for this practitioner who had been in practice for eight years.

[23] We also note the practitioner has little in the way of assets or income at the present time.

Issue 4 - is suspension necessary?

[24] The principles underlying the imposition of penalties in the disciplinary jurisdiction are now well known. Whilst the *Daniels*[4] decision is authority for the "least restrictive outcome principle", it also sets out the protective purposes of the disciplinary jurisdiction. The Tribunal's primary obligation is to protect the public and the reputation of the profession and hence the public's confidence in that profession. In order to mask the serious disapproval of the profession for the practitioner's failures we considered it necessary to:

[a] Make an order that he no longer practice on his own account; and

[b] Impose a period of suspension.

[25] The second relevant role of penalty in this matter is that of deterrence. We consider both general and specific deterrence to be relevant in this case. Specific deterrence is required for the practitioner to reflect on his previous practice. As a member of a profession he cannot just hold himself to account, but must accept the standards of the wider profession, even if he disagrees with those.

[26] In terms of general deterrence it is necessary for other practitioners to see that full cooperation with the disciplinary and monitoring institutions is essential and that falling below accepted standards in this regard will have serious consequences.

[27] The *Daniels* decision is also authority for the proposition that a practitioner's overall conduct in the proceedings can be taken into account when assessing fitness to practice.

[28] In reaching a period of three months suspension, we took into account the period of earlier Interim Suspension, and the self-imposed withdrawal from practise some six weeks prior to the penalty hearing.

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[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

Issue 5 - practice on own account

[29] We were persuaded on the basis of the concerns expressed above, that at this stage Mr Potter ought to have further mentoring or supervision. We recognise that this is a cautious response, which might not need to be long term, but is protective of the public in the meantime.

Issue 6 - costs

[30] We have referred to the practitioner's poor circumstances in a financial sense. Costs of over $19,000 were incurred by the Standards Committee. In these circumstances we do not consider it proper to award costs in full and the award of costs was made on the basis that the Society is to reach an accommodation for payment commensurate with the practitioner's ability to pay. It was also understood that this would not reflect on his ability to apply again for a practising certificate following his period of suspension. Costs were ordered in the sum of $12,000.

Orders

The orders made at the penalty hearing are attached as Schedule 1 to this decision.

Further orders

1. The s 257 costs awarded against the New Zealand Law Society are certified at $4,436.

2. The practitioner is to reimburse those costs to the New Zealand Law Society in full, on the basis of instalments and the criteria referred to in paragraph [30].

DATED at AUCKLAND this 31st day of October 2014

Judge D F Clarkson
Chair

Schedule 1

RECORD OF ORDERS MADE AT HEARING ON 14 AUGUST 2014

1. An order suspending from practice as a barrister or solicitor for three months. This period takes into account the fact that Mr Potter has already been stood down for some time and the interim suspension period served already.

2. An order prohibiting Mr Potter from practising on own account pursuant to s 242(1)(g) until authorised by the Tribunal.

3. We have considered the issue of costs. There will be an order Mr Potter pay a contribution towards the Standards Committee costs in the sum of $12,000. That order is made on the basis that the Society will reach an accommodation with Mr Potter that account Mr Potter's circumstances and that that will not impede Mr Potter's reapplication for a practising certificate at the end of the period of suspension.

4. The Tribunal s 257 costs are ordered against the New Zealand Law Society.

5. Pursuant to s 249 the s 257 costs of the Tribunal are to be reimbursed to the New Zealand Law Society.

DATED at AUCKLAND this 14th day of August 2014

Judge D F Clarkson
Chair