

**BEFORE THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 72

LCDT 009/14

BETWEEN

**THE HAWKE'S BAY STANDARDS
COMMITTEE OF THE NEW
ZEALAND LAW SOCIETY**

Applicant

AND

DAVID JOHN PORTEOUS

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms S Gill

Mr M Gough

Mr A Marshall

HEARING at Wellington

DATE 16 October 2014

COUNSEL

Mr TJ Gilbert for the Standards Committee

Mr J Morrison for the Respondent

**DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS
DISCIPLINARY TRIBUNAL CONCERNING PENALTY**

Introduction

[1] The hearing of the Tribunal on 16 October 2014 was one concerning penalty. The practitioner has admitted three charges of misconduct and two charges of unsatisfactory conduct in that he charged a fee that was not fair and reasonable but not gross overcharging. After the hearing and following deliberation, the Tribunal announced the following orders.

- (a) Strike off;
- (b) An order that he reduce his fee in respect of Ms S by \$22,500 and in respect of Ms A by \$11,955. (s 156(1)(e) of the Act));
- (c) That he refund the said amounts to Ms S and to the residuary beneficiary of the estate of Ms A. (s 156(1)(g) of the Act));
- (d) That he pay \$10,000 towards the costs of the Law Society. (s 249 of the Act));
- (e) The Tribunal costs against the New Zealand Law Society are certified at \$1,252. There is no order against the practitioner for the refund of the Tribunal's costs. (s 257)).

[2] It reserved its reasons to be delivered in writing. This decision now records those reasons.

Charges and background

[3] The practitioner has admitted all the underlying facts which are summarised as follows:

- (a) **Charge one** is one of misconduct and relates to the practitioner deducting a dormant balance held in trust for an elderly client without authority of the client. The practitioner did generate an invoice but retained it on his file. The net effect was that the practitioner deducted that dormant balance without authority and did not tell his elderly client that he had done so.
- (b) **Charge two** is one of unsatisfactory conduct. Again, the practitioner's client was aged, blind, partially deaf and in the early stages of dementia. During the period that the practitioner acted for this person, in relation to this charge he, among other things, deducted a fee of \$45,000.00 without reference to her and without her authority. The fee included a narration "for future attendances in relation to rest home matters and preparation for and attendances in relation to administration of your estate". The practitioner has pleaded guilty to unsatisfactory conduct on the basis that he charged a fee that was not fair and reasonable.
- (c) **Charge three** is one of misconduct. It relates to the same client referred to in charge two. The practitioner has pleaded guilty to the charge of misconduct because of his unacceptable billing and file management practices relating to his client. The charge has captured regulatory breaches by failures to send invoices or annual statements. He failed as well to provide certain information as required by Rule 3.4 of the Conduct and Client Care Rules and failed to maintain time records or to document an agreement relating to fees. He has accepted that his actions amounted to misconduct in that it constituted wilful or reckless contraventions of the Act/regulations and/or would be reasonably regarded as disgraceful or dishonourable.
- (d) **Charge four** is one of unsatisfactory conduct. The practitioner acted for a client who died in January 2011. He became sole executor and trustee of her will. He charged a fee of \$35,280 which comprised \$17,200 for services during the life of his client and \$18,080 for services following her death. The Committee has been able to establish by

access to the practitioner's workings that he charged an hourly rate of \$1,146 for the work done while his client was alive. By the same method, it has been established that the practitioner charged an hourly rate of \$775 for work done after the death of his client. The practitioner's pleas of guilty to this charge of unsatisfactory conduct is an acceptance that the fees he charged were not fair and reasonable for the services he provided.

- (e) **Charge 5** is one of misconduct. The practitioner has pleaded guilty to misconduct as it relates to his billing and file management practices with regard to his elderly client referred to in charge four. The practitioner failed in the following:

- (i) to document any agreement relating to fees to be charged upon death;
- (ii) to complete time records to enable accurate invoices to be rendered;
- (iii) to send his client any material updating her with costs relating to his services;
- (iv) To be transparent in relation to the fee he ultimately charged.

Penalties sought by the Standards Committee

[4] The Committee has argued for the following orders:

- (a) An order to strike off,
- (b) An order for refund of fees;
- (c) Costs;
- (d) Refund of Tribunal costs.

[5] Mr Gilbert for the Committee has submitted that the following factors militate heavily in favour of strike off - namely:

- (a) Nature and gravity of the charges;
- (b) The practitioner's responses to the disciplinary process;
- (c) The previous disciplinary history of the practitioner.

[6] In respect of the nature and gravity of the offending, Mr Gilbert submitted that when viewed in combination, the charges to which the practitioner had pleaded guilty were serious. The way he managed his files, particularly in respect of fees, breached regulatory requirements. His conduct was grossly unprofessional.

[7] He further submitted that the involvement of elderly and vulnerable clients was a unifying theme in the offending. He said that any competent lawyer must know, especially when dealing with such clients, that the position of trust enjoyed by the profession carries with it onerous corresponding responsibilities. Scrupulous adherence to regulatory requirements is a minimum requirement to ensure transparency and that money held in trust cannot be misused.

[8] Thus any circumstance which involves a practitioner overcharging and/or taking funds for their own fees/use, accompanied by breaches of regulatory reporting requirements (thereby concealing what has occurred) must be viewed seriously.

[9] Counsel for the Committee has acknowledged that the practitioner's plea of guilty and acceptance of wrongdoing are matters legitimately to his credit. He submitted that it was not sufficient to displace the other factors which justify strike off.

[10] Counsel for the Committee outlined the practitioner's previous disciplinary history. Since 1999, the practitioner has been found guilty of disciplinary breaches on two previous occasions in 1999 and 2005. The offending in 1999 related to erroneous crediting of client funds to the firm's practice account and the certifying of monthly certificates which were incorrect. The practitioner was formally censured, fined \$2,000 and ordered to pay costs of \$2,700. He was ordered to undertake a

“Trust Account Partner Course”. He was required to engage a third party to inspect the management of the firm to ensure compliance with all regulatory requirements relating to the trust account and provide such advice as was appropriate.

[11] His offending in 2005 involved multiple complaints. In March 2005, the practitioner pleaded guilty to or was found guilty of a variety of disciplinary offences which were framed as “*misconduct, that is conduct which is of such gravity as to be properly characterised as being reprehensible, inexcusable, disgraceful, deplorable or dishonourable*”. There were 7 charges to which he either pleaded guilty or was found guilty of.

[12] It is not necessary to set out the detail of the offending, Suffice it to note that the most serious matters involved the practitioner doing the following:

- (a) Witness as signing a deed knowing that the person signing was not who he purported to be;
- (b) Selling a business without appropriate authority;
- (c) Dispersing funds without ensuring that the funds were in fact paid to the client;
- (d) Signing a memorandum of transfer purporting to have witnessed the person’s signature in his presence when it was not so signed.

[13] What is relevant to the consideration of penalty in this matter, is that the Tribunal in its decision at the time told the practitioner that it was very much his last chance and that “*it is inconceivable that, if there were any repetition of these sorts of things, you could survive as a practitioner*”. It went on to warn the practitioner that a repetition of such conduct would very likely be the end of his career.

Submission for the Practitioner

[14] Mr Morrison for the practitioner has accepted the inevitability that strike off should follow the practitioner’s guilty pleas to these charges. He told the Tribunal

that the practitioner has surrendered his practicing certificate and is selling his practice. He has also applied to be bankrupted.

Decision

[15] The Tribunal unanimously reached the conclusion that strike off was the justifiable penalty having regard to the seriousness of the conduct and the previous disciplinary history of the practitioner for which he received a final warning. To have ordered otherwise would have rendered hollow such a strong final warning.

DATED at AUCKLAND this 21st day of November 2014

BJ Kendall
Chairperson