NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 76
LCDT 024/14

UNDER	the Lawyers and Conveyancers Act 2006
IN THE MATTER	of disciplinary proceedings under Part 7 of the Act
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 5** Applicant
AND	**ANTHONY VINCENT RAM** Former Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms C Rowe
Mr W Smith
Mr I Williams

HEARING at Auckland

DATE OF HEARING 12 November 2014

APPEARANCES
Ms S Earl for the Standards Committee
No appearance for the Practitioner

RESERVED DECISION OF THE TRIBUNAL

(On Liability and Penalty)

[1] Mr W, the complainant had owned a house in New Zealand which was sold by mortgagee sale in 2008. There was a surplus, and in May 2009 Mr W instructed Mr Ram to receive it and hold it on his behalf.

[2] Although Mr Ram only held a practising certificate as an employed barrister and solicitor (supposedly an in-house lawyer), he held himself out to the client and to the firm disbursing the funds as able to act. His ostensible "employer" was a company, Capital Trust (NZ) Limited, in which Mr Ram was the major shareholder and sole director. Effectively, he was practising on his own account.

[3] Mr Ram received the $154,835.81 sale proceeds in June 2009. Subsequent investigations by a forensic accountant[1] have tracked these funds into either personal accounts of Mr Ram, or into accounts of companies which are "alter ego" companies - fully owned and directed by Mr Ram.

[4] After two years of email correspondence with Mr Ram, Mr W became suspicious. He had his own difficulties in Hong Kong, where he lived, and was not able to come to New Zealand until 2013. Having failed to locate Mr Ram or to receive a satisfactory explanation as to the whereabouts of his funds, he complained to the Law Society.

[5] That complaint led to the current charges which are in essence:

1. Misappropriation of client funds;

2. Practising contrary to his practising certificate; and

3. Failing to respond to a s 147 notice to produce files and other records to the Standards Committee.

[1] David John Osborn, affidavit dated 30 May 2014.

[6] It is thought that Mr Ram is currently overseas. After refusing a last minute written adjournment application by him, for the reasons set out in our oral decision of 12 November 2014, the hearing proceeded, on a formal proof basis, to consider the comprehensive evidence called by the Standards Committee.

Issues

[7] The issues to be determined are:

1. Charge 1

   (a) Has the Standards Committee met the burden of proof in respect of such serious allegations?

   (b) Can the explanations of Mr Ram adequately answer the allegation that he has misappropriated his client's funds?

2. Charge 2

   Did Mr Ram provide regulated services to Mr W contrary to the terms of his practising certificate?

3. Charge 3

   Did Mr Ram fail to respond to the s 147 notice?

4. If there was non-compliance was it a wilful or reckless breach of the Rules or the Act?[2]

5. If liability in respect of one or more charges is established, what is the appropriate penalty?

   (a) How serious is the conduct?

   (b) Are there mitigating factors?

   (c) Are there aggravating factors?

[2] Lawyers and Conveyancers Act 2006.

Issue 1 - Charge 1

[8] The evidence established that having accepted Mr W's instructions, Mr Ram wrote to the firm which was disbursing the surplus mortgagee sale funds and requested that they be placed into *"our account at Capital Trust until such time as the matter is resolved and all parties are duly and fairly heard at High Court in Auckland".* This letter was headed and signed *"A V Ram, Barrister and Solicitor".*

[9] On 9 June 2009 the other firm wrote to Mr Ram to inform him that they had been contacted by Hong Kong Trustees-in-Bankruptcy, who had requested them not to disburse the funds. They therefore sought confirmation from the practitioner that the funds would be held by him in his solicitors trust account as a "stakeholder" until the issues between Mr W and the Trustees-in-Bankruptcy were resolved.

[10] Mr Ram replied as follows the very same day:

> "We confirm that we will hold the monies in trust in an interest bearing account until all matters relating to the Hong Kong trustees-in-bankruptcy are duly resolved by the High Court at Auckland. No monies will be advanced to either party until proper High Court orders have been duly obtained."

[11] The funds were transferred to the Capital Trust account on 12 June 2009.

[12] We now adopt, from the opening submissions of the Standards Committee the following description of how the practitioner treated the funds from that point:

> "3.9 Between June 2009 and November 2011, the practitioner exhausted the funds, as follows (affidavit of David Osborn, pp 8-9, 11-12; affidavit of Ian Varley, p 14 and 23):
>
> (a) On 15 June 2009, the amount of $7,800.00 was transferred by the practitioner from the Capital Trust account referred to above to an account in the name of Hobson Street (NZ) Ltd. The Practitioner is a director and sole shareholder of Hobson Street (NZ) Ltd;
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> (b) On 15 June 2009, the sum of $5,947.50 was paid from the Hobson Street (NZ) Ltd account to Simpson Grierson;
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> (c) On 15 June 2009, the sum of $3,827.19 in the Hobson Street (NZ) Ltd account was used to eliminate an overdraft held by that company;
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> (d) On 15 June 2009, the practitioner issued a cheque from the Capital Trust account referred to above to the New Zealand Law Society, in the sum of $1,321.87;

(e) On 15 June 2009, the practitioner transferred the sum of $140,000.00 from the Capital Trust account referred to above to a Capital Trust term deposit account (12-3109-0035454-72);

(f) On 30 September 2009, the practitioner transferred the sum of $140,495.58 from the Capital Trust term deposit account to an account in the name of the practitioner (account 12-3140-0237038-51);

(g) On 30 September 2009, the practitioner transferred the sum of $140,000.00 from the account in the name of practitioner referred to above to a different account in the practitioner's name (account 12-3140-0237038-77);

(h) Between 9 November 2009 and 31 December 2011, the practitioner transferred funds from the account ending -77 to various accounts in his name or that of companies owned entirely by him. The bulk of the funds were expended by the practitioner to reduce existing overdrafts ($65,025.24), to pay credit card debt ($29,557.15) and to pay business and personal debts and expenses (including bank charges, living expenses and a payment of $20,000 to the trust account of Fyers Joyce barristers and solicitors of Auckland payable to Pro Vision Technologies Ltd, from which a cheque was issued payable to Pro Vision Technologies Ltd). In addition, on one occasion the practitioner transferred the sum of $2,500 from the -77 account to a different account in his name, from which he withdrew the sum of $2,300 in cash. A further 18 miscellaneous cheque payments of between $12.00 and $520.00 were made, to a total of $5,472.85."

[13] At the end of these transactions a total of $151,088.88 had been traced and a balance of $3,746.93 made up of some small sundry transactions was also established.

[14] The practitioner has provided to the Law Society a number of responses including a response to the complaint, in a letter of 14 July 2013, in which he attacks the character of the complainant and distracts from the essence of the complaint by discussing various tax investigations involving the complainant and indicating he was still to receive information from the complainant. He also provided a large response including a chronology and written submissions. This amounts to 168 pages all of which have been provided to the Tribunal for its consideration. The main thrust of his arguments are to the effect that he was unable to properly pay out the funds which he had "invested" on behalf of Mr W because he was unclear about his client's bankruptcy status and had been misled by his client.

[15] None of the matters raised by him actually addressed why the funds have been applied for the practitioner's own purposes.

[16] The evidence of the two inspectors appointed, Mr Varley and Mr Osborn provided the Tribunal with evidence of Mr Ram's various company interests and set out in careful detail the tracing exercise carried out to follow the funds through into the various accounts operated by Mr Ram or his companies.

[17] In his evidence Mr Osborn also referred to the practitioner's statement (in response to the complaint) to the Standards Committee that:

> "… the entire settlement funds "can be realised and returned within reasonable time from the date of request. Hobson Street (NZ) Ltd has most of the funds invested, this has approximately $200,000 equity and $80,000 with rental income of $29,000 per month"."

[18] The practitioner also advised Mr W by email of 27 January 2010 that he had invested $80,000 in short term investment and $50,000 in long term investment. Mr Osborn's evidence in relation to both of these purported explanations is that they are completely unsupported by his analysis of the transfer of funds:

> "…Of the funds transferred from (the firm) to the Practitioner, the sum of $37,800 was transferred to accounts held by Hobson Street (NZ) Ltd. Those funds were entirely exhausted by eliminating overdrafts and paying expenses. Accordingly, it is not correct to say that the funds were invested in that company.
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> 3.4 Of note also is that as at 27 January 2010 (the date of Mr Ram's email to Mr W), around $80,000 was remaining of the funds initially transferred from (the firm). All the other funds had been exhausted. The $80,000 was residing in account number 12-3140-0237038-77, in the name of Mr A V Ram. It commenced to be expended from 5 May 2010 on similar expense categories as the earlier funds had been expended - eliminating overdrafts, a cash withdrawal, and paying personal and business expenses.
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> 3.5 Based on my analysis, the Practitioner's statement that $80,000 was invested in short term investment and $50,000 in long term investment is false."

[19] It is quite clear from the careful and unchallenged forensic evidence that Mr Ram has simply stolen these funds from his client and put them to his own use. We find this on the balance of probabilities to the high standard required in relation to such a serious allegation. We find Charge 1 proven.

[20] Such conduct is clearly misconduct pursuant to s 7(1)(a)(i) being disgraceful and dishonourable.

Issue 2 - Charge 2

[21] The evidence in relation to this charge has already been referred to in terms of the letterhead and communications which Mr Ram had with the firm disbursing Mr W's funds. He was clearly holding himself out as practising on his own account while having obtained a practising certificate on 20 February 2009 purportedly as an in-house counsel for Capital Trust (NZ) Ltd, his own company.

[22] In September of that year Mr Ram advised the Law Society that he was leaving the employment of Capital Trust to commence practice as a barrister. It was not until April of 2010 that he advised the Law Society further that he had commenced employment with Amicus Barristers Chambers on 15 February 2010. He was not granted a practising certificate as an employed barrister until 14 May 2010. This is established by the evidence of Mr Garreth Heyns.

[23] We find on the balance of probabilities that this charge is also established. The specific Rules and Sections pleaded in support of Charge 2 are:

> "Paragraph 15.2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, which states:
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> **Practice as an in-house lawyer**
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> 15.2 When an in-house lawyer provides regulated services to the non-lawyer by whom he or she is engaged, he or she must do so pursuant to a lawyer-client relationship.
>
> […]
>
> 15.2.3 Except to the extent expressly authorised by section 10 of the Act, an in-house lawyer may not provide regulated services to a client or member of the non-lawyer by whom he or she is engaged."

And s 30 of the Act states:

> "**30 Practice by lawyer on his or her own account**
>
> (1) No lawyer may commence practice on his or her own account, whether in partnership or otherwise, unless–
>
> (a) he or she–

> (i) meets the requirements with regard to both practical legal experience and suitability that are imposed by rules made under this Act; and
>
> (ii) meets any other criteria that are prescribed by rules made under this Act; or
>
> (b) he or she is granted by the High Court, on grounds set out in rules made under this Act, leave to practise on his or her own account.
>
> […]
>
> (6) A lawyer commits an offence who, in contravention of this section, commences practice on his or her own account."

[24] The Standards Committee also alleges that the conduct amounts to a breach of s 9 of the Act whereby misconduct is established if a lawyer who is an employee "provides regulated services to the public other than in the course of his or her employment by a lawyer, partnership, incorporated law firm".

[25] In relation to Charge 2, if the practitioner was not wilful in his holding himself out to be employed as in-house counsel of a company largely owned and directed by him, then he was at least reckless. That is one of the bases for a finding of misconduct.

[26] We also find misconduct is established in terms of s 9.

Issue 3 - Charge 3

[27] The s 147(2)(a) notice was sent to Mr Ram on 20 August 2013 following the complaint in June 2013 and some subsequent correspondence with the practitioner. He was required to provide his complete file in relation to Mr W, any invoices issued in respect of his attendances on Mr W, and copies of all bank records to that date in relation to the funds received on behalf of Mr W. On 29 August Mr Ram sought an extension for one week which was refused given that he still had until 3 September to provide the information which the Law Society thought should be readily available.

[28] Instead of providing the documentation requested Mr Ram provided a written response in which he set out the full text of s 147 and contended he had complied with all of his obligations under the Rules of Conduct and Client Care. He again

alleged criminal conduct on behalf of his client and claimed Mr W's complaints to be defamatory.

[29] It was not until 4 March 2014 that he provided the large packet of documents which included emails, costs agreement and "investment agreement" correspondence and submissions. The evidence establishes that the practitioner has never provided all of the documentation requested in the notice. Certainly he did not provide the banking records which would appear to have been crucial to the investigation at hand. We answer the question posed in **Issue 3** "Yes".

Issue 4 - Was the non-compliance wilful or reckless?

[30] We consider that the Standards Committee has made out a strong case to infer the non-compliance is wilful or reckless. He has an obligation to comply with lawful requests of the Standards Committee. His correspondence is lengthy, tangential, self-serving and evasive.

[31] Section 7(1)(a)(ii) defines wilful or reckless breaches of the Rules or the Act as misconduct.

[32] Thus the Standards Committee has established misconduct in respect of Charge 3 also.

Penalty

[33] In the decision of *Hart*[3] the starting point in determining penalty is to establish the seriousness of the conduct under consideration.

(a) Seriousness of the conduct

[34] Clearly Charge 1 is the most serious and the "lead offence" committed by Mr Ram. It is the most serious kind of misconduct dealt with in the disciplinary jurisdiction. Misappropriation of client funds is not only criminal behaviour but cuts across the crucial relationship of trust and confidence reposed in a lawyer by a client. For that reason all of the decisions dealing with the disciplinary penalties acknowledge that dishonesty at this level must receive the ultimate sanction, namely

[3] *Hart v Auckland Standards Committee No. 1* [2013] 3 NZLR 103.

strike off. In this case the Standards Committee does seek strike off of the practitioner.

(b) Mitigating factors?

[35] The Tribunal is unable to discern any mitigating features which could be raised on behalf of the practitioner in this matter.

[36] Inexperience could perhaps have been raised but has not been raised by the practitioner in any of his responses notwithstanding the fact that in the intervening period he was given the benefit of that particular doubt in an earlier decision of the Tribunal, following his pleading guilty to another charge of misconduct in practising contrary to his practising certificate.

(c) Aggravating features

[37] As set out in *Hart*[4] previous disciplinary history and response to the disciplinary process are both matters which reflect on fitness to practice and are relevant to penalty as a whole.

[38] This practitioner has failed to engage in the disciplinary proceedings and the oral decision refusing his adjournment application sets out the evasive and less than straightforward manner of approaching these proceedings. In behaving in this manner he has shown that he fails to appreciate what it means to be part of a professional community whereby the upholding of commonly held values and standards are adhered to.

[39] In terms of his previous offending there are two findings of misconduct against him, relating to conduct between March and October 2009, that is a similar period when this offending occurred. In a decision of November 2011, with the support of the Standards Committee, Mr Ram was treated extremely leniently by another Tribunal.

[40] In addition to that there are two further findings of unsatisfactory conduct, one of which also bears on his lack of honesty and integrity in that it involved a complaint from a Judge about Mr Ram having presented submissions which were significantly

[4] See footnote 3.

copied from submissions in an earlier trial where the facts were quite different. His conduct was found to be such that it fell below the relevant standards for presentation to a Court and breached the duty of fidelity to the Court.

[41] As a Tribunal of five members we are unanimous in our view that there is no penalty short of strike off that would properly reflect the seriousness of these current three charges and having regard to the aggravating features above.

[42] The Standards Committee has sought an order as to compensation pursuant to s 156(1)(d). We consider that compensation arises out of both Charges 1 and 2 and that there ought to be a separate award as is provided for in the legislation in relation to each loss. In no way do they approach the total loss experienced by the client but the maximum award is justified in our view in these circumstances given the blatant dishonesty of the practitioner and his attempts to evade detection for many years. There will be an award of $25,000 in respect of Charge 1 and a further $25,000 in respect of Charge 2.

Costs

[43] The costs of the Law Society in the sum of $16,038.36 are awarded against the practitioner, Mr Ram under s 249.

[44] The s 257 costs which will be awarded against the New Zealand Law Society are also to be reimbursed by Mr Ram to the New Zealand Law Society.

Orders

[45] A summary of our orders is as follows:

1. The practitioner is struck from the roll of barristers and solicitors pursuant to s 242(1)(c).

2. Mr Ram is to pay compensation of $50,000 in total pursuant to s 156(1)(d) that is $25,000 in respect of each charge proven.

3. Mr Ram is to pay the Standards Committee costs in the sum of $16,038.36.

4. The New Zealand Law Society is to pay the Tribunal hearing costs pursuant to s 257 in the sum of $2,203.

5. Mr Ram is to reimburse the New Zealand Law Society for the s 257 Tribunal costs in the sum of $2,203.

DATED at AUCKLAND this 26th day of November 2014

Judge D F Clarkson
Chair