NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 78

LCDT 037/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**HAWKE'S BAY STANDARDS COMMITTEE** Applicant
AND	**JONATHAN CHARLES HEAPHY** Of Havelock North, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Mr A Marshall

Mr P Shaw

HEARING at Auckland Specialist Courts and Tribunals Centre

DATE OF HEARING 11 November 2014

APPEARANCES

Mr P Collins for the Standards Committee

Mr D O'Connor for the Practitioner

RESERVED DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL (RE PENALTY)

[1] We have recently found Mr Heaphy to be guilty of two charges of misconduct relating to the manner of investment of his client's funds and the circumstances of that, in which a conflict of interest between clients existed. We dismissed two other charges.

[2] We determined, following the penalty hearing, that in the particular circumstances of this case, and by a fine margin, that suspension of Mr Heaphy from practice was not warranted. We reserved our reasons for that determination, which we now set out.

[3] The facts which affected our decision are as follows:

1. The seriousness of the conduct.
2. Aggravating features?
3. Mitigating features?
4. Deterrence.
5. Protection of the public and the reputation of the profession.
6. Relevant penalty decisions.

1. Seriousness of the conduct

[4] The starting point in a penalty decision is the seriousness of the conduct found[1]. In our decision on liability we found[2] that the transactions in issue "… demonstrated a significant lack of professional judgment". We found that the practitioner had lost his

[1] *Hart v Auckland Standards Committee No. 1* [2013] 3 NZLR 103.
[2] At paragraph [52].

perspective, and had failed to maintain independence from his clients. The consequence for the client was a loss of a large amount of money, despite what we accepted was the lawyer's best intentions. We considered his actions to be beyond mere negligence and found misconduct.

[5] However, there was no dishonesty involved on the part of the practitioner nor any personal gain which would demand a penalty of strike off or suspension.

[6] We found the practitioner's conduct to be an isolated event in an otherwise long and well-performed legal career. Thus the conduct was aberrant rather than constituting any form of pattern. This was accepted by the Standards Committee.

[7] We accepted the submission made by Mr Collins that the findings of the Tribunal in respect to the client's credibility ought not to "detract from the practitioner's culpability". The conflict of interest was a blatant one. Further we accepted the submission that the point at which a client is demonstrating flawed judgment, is the very time when a lawyer must rise above that and ensure strict observance of professional ethical rules.

[8] The seriousness of the conduct would point to suspension as a starting point and this was certainly sought by the Standards Committee.

2. Aggravating features

[9] We do not find there to have been any relevant features which aggravated the conduct or reflected on the practitioner's fitness generally. He instructed counsel and took a responsible approach to these proceedings. He defended them and was partially successful in his defence.

3. Mitigation

[10] On behalf of the practitioner a number of mitigating factors were raised for the Tribunal's consideration and we considered the following to be weighty.

[a] A long and unblemished career (almost 26 years). We have already noted that we consider this conduct to be out of character and isolated. This is reinforced by the fact that although the incident occurred over seven years

ago, Mr Heaphy has continued in practice without any further incident or reasons for concern.

[b] His "good character, reputation and significant contribution to the community". This submission was supported by numerous very impressive references as to the integrity of Mr Heaphy as a lawyer, as to his response to this offending and as to his community contributions. In respect of the latter contributions these are significant, involving a great deal of personal time and sacrifice.

It is often said that because the disciplinary jurisdiction is not a personally punitive one, that personal circumstances on the positive side of the equation cannot be given as much weight. That is so, however we considered that when a lawyer contributes in a significant way to his or her community, he or she thereby enhances the reputation of the profession. That must give considerable credit, as it does in this case ,when assessing any harm to the profession from the offending. In this instance we consider that Mr Heaphy is and has been an asset to his community and therefore to his profession (other than in relation to these isolated events).

[c] Acceptance of responsibility and expression of remorse is submitted as another mitigating feature and we record that this was apparent from the practitioner's evidence. We noted that he has already suffered considerable harm in terms of his reputation, will bear the costs of the proceedings and has suffered a deterioration in his health. There was medical evidence in support of the latter. It is clear the practitioner accepted this censure as a serious expression of his profession's displeasure and that it carried some considerable weight.

[d] The next ground of submission as to mitigation, related to the circumstances under which Mr Heaphy was operating in his previous firm. We accept to some extent the submissions as to the pressures on him arising out of a partner's illness but give lesser weight to the suggestions made as to the shortcomings within the firm.

[e] It is accepted that there was no question of dishonesty or personal gain in the practitioner's conduct.

4. Deterrence

[11] We accept that in cases of serious misconduct the prospect of suspension carries a considerable deterrent effect. We have determined that for the reasons already expressed there is no need for specific deterrence in relation to this practitioner. We accept however that a strong message must be sent to the profession that matters of conflict of interest and improper investment of funds are treated with a very firm response.

5. Protection of the public and reputation of the profession

[12] We accept the submission made on behalf of the Standards Committee, referring to the *Daniels*[3] decision:

> "[22]It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. In the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practising for a fixed period will be required.
>
> …
>
> [24] A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.

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

> [25] It will not always follow that a practitioner by disposing of his practice and undertaking not to practise can avoid or pre-empt an order for suspension. The consideration of whether to suspend or not requires wider consideration of all the circumstances. The real issue is whether this order for suspension was an appropriate and necessary response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also the other purposes of suspension."

[13] And further that in *Davidson v Auckland Standards Committee No. 3*[4] that:

> "(*An appropriate penalty)* must maintain the public's confidence in the profession's discharge of its obligations to discipline its members".

[14] There is no proven risk to the public from the practise of this lawyer. Indeed the references provided by him would to the contrary suggest that he is a careful and diligent practitioner who always puts the needs of his clients to the forefront.

[15] The question is whether a period of suspension is required to demonstrate a sufficiently serious response and thereby maintain the confidence of the public.

6. Relevant Penalty Decisions

[16] We were referred to a number of decisions where despite serious misconduct, suspension had not been imposed. These included *Korver,*[5] *Sanders,*[6] *Stirling*[7] and *Fendall*.[8]

[17] Against that is the dicta in *Davidson*, however we see that case as being in a quite different category in terms of public interest and confidence and distinguishable on that basis.

[18] Finally we note that Mr Heaphy has offered to provide undertakings not to be involved in investment advice for a period up until March 2016, nor to be a principal in a firm until that date.

[19] Those are restrictive undertakings which we consider go a considerable way to demonstrating a firm response.

---

[4] [2013] NZHC 23/15, [2013] NZAR 1519 [142].
[5] *Auckland Standards Committee No. 2 v William Gerald Korver* [2011] NZLCDT 22.
[6] *Auckland 356 Complaints Committee and Auckland No. 1 Standards Committee v John Hardwick Sanders* [2010] NZLCDT 21.
[7] *Auckland Standards Committee v John Stirling* [2010] NZLCDT 13.
[8] [2012] NZHC 1825.

[20] For the reasons set out, and by a fine margin, we have determined that we ought not to suspend Mr Heaphy from practice. We turn to consider some of the other orders sought.

Compensation

[21] The client in this matter has entered into a deed of settlement with the practitioner's former firm. We do not consider we ought to go behind such a document or indeed undermine its provisions by an order for compensation in these particular circumstances. We note that the award is a discretionary one and we exercise our discretion against it on this occasion.

Suppression

[22] Suppression is sought in respect of the client's name. At the outset of the hearing a similar application was made and refused for the reasons then given, largely relating to Mr Porter's name being in the public domain as a result of the criminal convictions sustained by him and the very significant publicity that accompanied the criminal trial process. We do not intend to revisit this ruling and any further application for suppression is denied.

Costs

[23] Given the mixed results the Standards Committee responsibly sought an apportionment of half the costs to be awarded against the practitioner. We consider likewise that the s 257 costs which must be awarded ought to be similarly apportioned.

Orders

1. The practitioner is formally censured pursuant to s 156(1)(b).

2. The practitioner is to provide the New Zealand Law Society with undertakings in terms described in paragraph [18] above.

3. There will be an order of costs against the practitioner in favour of the Standards Committee in the sum of $21,000.

4. There will be an order pursuant to s 257 against the New Zealand Law Society in the sum of $18,025.

5. The practitioner is to reimburse the New Zealand Law Society half the s 257 costs ordered above.

6. There is no order as to compensation.

DATED at AUCKLAND this 1st day of December 2014

Judge D F Clarkson
Chair