NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 8
LCDT 037/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **EION MALCOLM JAMES CASTLES** of Auckland, Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms C Rowe
Ms M Scholtens QC
Mr P Shaw

HEARING at AUCKLAND

DATE 17 February 2014

COUNSEL
Mr J Katz QC, for the Standards Committee
No appearance for the respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL ON PENALTY

[1] On 17 February the Tribunal heard submissions on penalty, having considered the comprehensive written submissions filed by Mr Katz QC on behalf of the Standards Committee ("SC"), and the supporting authorities.

[2] Following submissions, personal statements were made by the complainants Mr and Mrs W.

[3] Having retired to consider the orders sought the Tribunal announced its unanimous decision that the practitioner was to be struck off the roll of barristers and solicitors and made the following orders; in an oral decision:

> **"Summary of Orders Made**
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> Charge 4
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> 1. Striking off: s.112(2)(a) LPA
> 2. Penalty payable to the Law Society of $5,000; s.112(2)(d) LPA.
> 3. Compensation to the W's jointly and severally of $5,000: s.106(4)(e) by virtue of s.112(2)(f) LPA.
> 4. Reduction of fees to $462,000 and repayment to the W's jointly and severally of the overcharge of $482,721 to be made by the practitioner: s.106(4)(f) by virtue of s.112(2)(f) LPA.
> 5. Costs to the Law Society of $107,000 net together with disbursements of $3,899.62: s.257 LCA.
> 6. Costs of the Tribunal of $[the sum to be advised by the Chairperson of the Tribunal] and an order that Mr Castles reimburse the Law Society in that amount: ss.257(1)(a) and 258 (2) LCA.
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> Charge 5
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> Censure: s.112(2)(e) LPA.
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> Charge 6
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> Censure: s.112(2)(e) LPA.

Charge 7

1. Striking off: ss.242(1)(c) and 244 LCA.

2. An apology to A W and M W: s.242(1)(d) by virtue of s.156(1)(c) LCA.

3. Costs to the Law Society of $107,000 net together with disbursements of $3,899.62: s.257 LCA.

4. Costs of the Tribunal of $[the sum to be advised by the Chairperson of the Tribunal] and an order that Mr Castles reimburse the Law Society in that amount: ss.257(1)(a) and 258(2) LCA.

Charge 8

1. Striking off: ss.242(1)(c) and 244 LCA.

2. An apology to A W and M W: s.242(1)(d) by virtue of s.156(1)(c) LCA.

3. Costs to the Law Society of $107,000 net together with disbursements of $3,899.62: s.257 LCA.

4. Costs of the Tribunal of $[the sum to be advised by the Chairperson of the Tribunal] and an order that Mr Castles reimburse the Law Society in that amount: ss.257(1)(a) and 258(2) LCA."

[4] The orders as to costs and of course as to strike off are concurrent. We reserved reasons for the penalties imposed. This decision provides those reasons.

Charge 4

[5] The background to this matter is set out in a lengthy decision of the Tribunal dated 29 November 2013. In that decision we found the practitioner guilty of professional misconduct under the Law Practitioners Act 1982 ("LPA") in relation to overcharging. This was the composite charge brought by the Standards Committee.

[6] It has to be said that the level of overcharging was extraordinary, as can be seen from our order for repayment of fees in the sum of $482,721. Just a few days before the penalty hearing we were advised by counsel for the practitioner that the practitioner would be making a voluntary application to be declared bankrupt. Counsel then indicated his retainer was at an end and thus we did not have the benefit of any submissions on behalf of the practitioner. The practitioner filed nothing himself and failed to appear before the Tribunal at the penalty hearing.

[7] As we found in our substantive decision, we were unimpressed by the practitioner's attempts to justify himself, particularly when such occurred at the expense of his clients. His lack of remorse and absence of contrition was evident throughout the 10 days of hearing. It was reinforced by his failure to appear at the penalty hearing. We consider these to be aggravating features and relevant to the assessment of whether he is a fit and proper person to practice as a barrister and solicitor.

[8] We were advised again shortly prior to the penalty hearing that he had handed in his practising certificate. We can only take from that the practitioner's acceptance that the findings in our substantive decision and the further serious misconduct found, was likely to be reflected in a finding that he was no longer 'fit and proper'.

[9] The complainants have been utterly ruined financially and emotionally devastated by the practitioner's actions and by the knowledge that they are unlikely to ever recover any of the overpaid funds or be in a position to restore themselves.

[10] Both Mr and Mrs W directly addressed the Tribunal about their dismay that the practitioner could continue to enjoy a privileged lifestyle while declaring he had no assets of his own.

[11] In very comprehensive submissions counsel for the Standards Committee reminded the Tribunal of the well-known decision of *Bolton v The Law* Society[1] where in discussing the necessary attributes of a legal practitioner, described by counsel as "a repository of trust and confidence, integrity and honesty", the Court referred to the purpose of disciplinary proceedings and penalty in the following way:

> "The second purpose is the most fundamental of all - to maintain the reputation of the solicitors' profession as one in which every member of whatever standing may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission."

[12] Mr Katz also referred to the findings in our substantive decision in relation to dishonesty on the part of the practitioner by misleading the Standards Committee on two occasions and the finding that he had represented non-chargeable time to

[1] [1994] 2 All ER 486 (Court of Appeal), at 492.

appear as a discount to his clients in a manner which we found to be "utterly misleading".[2]

[13] Mr Katz reminded us of the vulnerability of these clients, a matter which was in *Hart*[3] considered an aggravating feature. We accept these clients were particularly vulnerable because their contact with Mr Castles began after they were let down by their previous lawyer, who had made a serious error in the manner in which their leaky building proceedings were issued. Whilst that practitioner immediately acknowledged his error and referred Mr and Mrs W for independent advice, this occurred at a crucial point in the leaky building proceedings, that is, just before a settlement conference was to be held. Thus the clients were desperate for immediate legal help in the situation in which they found themselves. As time went on their vulnerability increased because of their enormous financial investment in the proceedings and their precarious personal finances as a result. Furthermore, as they reiterated in their evidence, they had had total faith and trust in Mr Castles.

[14] A further aggravating feature relating to the overcharging is the previous history of the practitioner. Although there are no misconduct findings (because under the earlier legislation there was a more difficult threshold in relation to gross overcharging), there was a long history of some 25 years of complaints against the practitioner for overcharging. This occurred on 18 occasions and in nine of those occasions the practitioner's fees were reduced, therefore the complaints found to be established.

[15] We inferred from this history (and in the absence of any explanation to the contrary from the practitioner) that this was a practitioner who was either totally lacking in insight about the wrongfulness of his charging practices or, worse, simply did not care about complaints about his charging or indeed how that might reflect on his profession as a whole.

[16] Finally his response to the disciplinary process is a further aggravating feature of the misconduct. Not only are there the misleading statements already referred to, but it is clear that this practitioner delayed the proceedings as long as possible with

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[2] *Auckland Standards Committee No. 3 v Eion Malcolm James Castles* [2013] NZLCDT 53, para 70.
[3] *Hart v Auckland Standards Committee No. 1* [2013] 3 NZLR 103.

three adjournments of the fixture and non-compliance with directions throughout. In addition to that were the earlier delays in dealing with the costs assessors. This delay was despite the practitioner's knowledge that one of the complainants was suffering from a terminal illness.

[17] In addition to the *Bolton* and *Hart* decisions, counsel for the Standards Committee referred us to a number of further decisions concerning penalty, including Australian authorities. We were also referred to the decision of *LPCC v Lashansky*[4] where it was commented that the previous disciplinary history "*may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.*"

[18] The Tribunal of five members unanimously reached the view that no penalty short of strike off could properly reflect the seriousness of this practitioner's misconduct and ensure future protection of the public.

[19] Insofar as the order for refund of fees is concerned, we consider that the cost assessors made a relatively generous assessment of $462,000 overall fees for three sets of proceedings which recovered in total $660,000 for the complainants. We consider an order for repayment of the overcharged fees is proper. We consider that any difficulties in recovery are irrelevant for the purposes of assessing proper penalty. That is a matter for the Standards Committee to pursue in due course.

Charges 5 and 6

[20] In respect of these two charges which, as with Charge 4 were laid under the LPA, whilst we consider this misconduct was serious, we accepted the submission of counsel for the Standards Committee that a proper penalty was that of censure. Had strike off and related penalties not been imposed in respect of Charge 4 we would have considered a further penalty in relation to Charge 5 in particular, however in the end found it unnecessary.

[4] [2007] WASC 211 at para 35.

Charges 7 and 8

[21] These charges were laid under the Lawyers and Conveyancers Act 2006 ("LCA") and we considered they also justified a penalty of striking off for the reasons already set out under Charge 4. Protection of the public and the lack of insight of practitioner in particular in relation to these charges means that no penalty short of strike off would suffice.

[22] Section 257 costs of the Tribunal are certified at $64,500.

DATED at AUCKLAND this 14th day of March 2014

Judge D F Clarkson
Chair