NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 8
LCDT 035/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **CANTERBURY WESTLAND STANDARDS COMMITTEE 2 OF THE NEW ZEALAND LAW SOCIETY**

AND **JOHN REVANS EICHELBAUM** of Auckland, Barrister

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Dr I McAndrew
Mr S Maling
Ms S Sage
Mr W Smith

HEARING at Auckland

DATE OF HEARING 13 February 2015

DATE OF DECISION 30 March 2015

COUNSEL
Ms K Davenport QC for the Standards Committee
Mr A H Waalkens QC for the Practitioner

REASONS FOR PENALTY DECISION OF
NEW ZEALAND LAWYERS AND CONVEYANCERS
DISCIPLINARY TRIBUNAL

[1] In its decision of 18 November 2014, the Tribunal found Mr Eichelbaum guilty of two charges of misconduct and one charge of unsatisfactory conduct. Three further charges were dismissed.

[2] The background to these findings is contained in that judgment and will not be repeated. In summary, we found that the wrongful issue of a Statutory Demand, although later withdrawn, was unprofessional and improper. This we found to be at "*the very highest level of unsatisfactory conduct"*.

[3] The first misconduct (Charge 2) we found to constitute "*seriously reprehensible*" conduct which "*would be regarded by lawyers of good standing as disgraceful or dishonourable*".

[4] The second misconduct, which we considered as a composite of two charges, related to five separate communications, some of which were accepted by Mr Eichelbaum as totally unacceptable. We found they demonstrated "*that he was impervious to the consequences and disregarded his professional standards entirely*".

[5] The issues to be determined when imposing penalty on Mr Eichelbaum are:

1. Is the level of misconduct so serious as to demand a suspension of the practitioner, as a proportionate response, having regard to aggravating and mitigating factors?

2. Is it proper to order compensation in favour of the complainants as sought?

3. Should any order be made as to apology to the complainants or others?

4. What proportion of the costs of the prosecution ought to be borne by the practitioner?

5. Should the practitioner's name be suppressed, as well as details of the background?

Principles

[6] The authorities have identified a number of purposes to be taken into account in imposing penalty in professional disciplinary matters. These include:

- Protection of the public;
- Maintenance of professional standards and upholding of public confidence in those standards;
- Rehabilitation;
- Deterrence;
- Punishment (although this last purpose is often seen as merely a consequence of the former purposes).

[7] Dicta in the *Daniels*[1] decision reminds us that the Tribunal must impose the least restrictive intervention possible to achieve those purposes.

[8] The starting point must be the seriousness of the conduct itself and we have referred, in the opening of this decision, to the Tribunal's findings as to seriousness.[2] Viewed overall the pattern of conduct relating to Mr Eichelbaum's interactions with these particular clients, and subsequently their lawyers, was seriously out of line. However, in order to achieve a proportionate response this conduct must be viewed in relation to the practitioner's overall conduct as a lawyer of many years' experience.

[1] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[2] *Hart v Auckland Standards Committee* [2013] NZHC 83.

Issue 1

Suspension

[9] The purposes of suspension are also discussed in the *Daniels*[3] decision and applying the principles there discussed to the current practitioner we note:

1. This practitioner is not a risk to the public.

2. Nor is he unfit to practise (although may require some further time to reflect on his behaviour).

3. The real issue is the protection of the reputation of the profession and whether any lesser penalty can be seen as a sufficiently serious response to this conduct.

[10] The Tribunal was faced with a similar dilemma in the *Davidson*[4] decision. In the end the High Court considered that, because of the serious nature of the conduct in question (whereby the practitioner, with an otherwise unblemished personal and professional character, had been convicted of offences in his role as the Chairman of the Board of a failed finance company, Bridgecorp Ltd) that suspension was a necessary response.

[11] We are persuaded by the argument advanced on behalf of Mr Eichelbaum by Mr Waalkens QC, that that case, which involved enormous loss of public money, was in a different and more serious category than the present offending.

[12] We turn then to look at the mitigating and aggravating features, if any.

1(a) Mitigatory Factors

[13] Mr Waalkens submitted that Mr Eichelbaum had "*by the fact of the Tribunal's decision suffered a substantial fall from grace. That is to say, the Tribunal's findings are for Mr (A) a significant penalty in itself*". This submission is significantly undermined by the application for final name suppression. While Mr Eichelbaum may

[3] See footnote 1.
[4] *Davidson v Auckland Standards Committee* [2013] NZHC 2315.

have himself been negatively affected by the Tribunal's decision, it cannot constitute a "*fall from grace*" if no one else knows about it. Thus the findings could not be seen in themselves a "*significant penalty*".

[14] Mr Eichelbaum has practiced as a lawyer for over 30 years and has no previous disciplinary findings against him.

[15] We have been provided with a number of glowing references from senior practitioners including four Queen's Counsel. Importantly, those senior lawyers, having read the Tribunal's decision and therefore being aware of the background to this matter, point to the practitioner's behaviour as aberrant and out of character.

[16] In the course of the hearing Mr Eichelbaum apologised to one of the complainants directly, and when prompted by the Tribunal, immediately undertook to apologise to that complainant's associate with whom there had been direct correspondence of an arrogant and bullying nature.

[17] Mr Eichelbaum has incurred significant legal fees in dealing with this matter and still faces ongoing litigation in relation to those disputed issues between him and his former client. His counsel referred to the considerable stress and lost income suffered by his client.

[18] Certainly Mr Eichelbaum is entitled to considerable credit for his previous unblemished disciplinary history and overall contribution to the profession. References are often not able to be given a great deal of weight because of the public protective purposes of penalty hearings but in this instance they do lend considerable weight in mitigation because of their insistence that this practitioner would not normally behave in this manner.

1(b) Aggravating Factors

[19] In her submissions for the Standards Committee, Ms Davenport QC raised a number of matters, including that Mr Eichelbaum had been warned to desist in his behaviour and had responded with threats. We regard this as being part of the conduct itself rather than an aggravating feature. She also pointed to his continuing to file inflammatory affidavits using intemperate language. Again we considered

there would be the risk of double counting were this to be regarded as an aggravating feature.

[20] Finally, Ms Davenport points to the response the practitioner made immediately upon receiving the Tribunal's decision. This response was to seek to recall it, stating that he disagreed with it and that it was inaccurate in parts. While Mr Eichelbaum is of course entitled to exercise his rights in relation to appeal without this being regarded as an aggravating feature, we do see this as demonstrating a lack of insight into his behaviour and thereby reducing the strength of some of the references which referred to this insight. In other words it removes a potential mitigating feature, ie. "a full level of insight and remorse".

[21] In summary we do not consider there to be any significant aggravating factors.

1(c) Acting for himself

[22] We note that this has variously been put forward as a mitigating and aggravating feature. We consider that it reflects on the issue as to whether the public requires protection from Mr Eichelbaum and we have clearly stated that it does not. However, it has to be recorded that the behaviour was directed, at times against former clients, which we have marked as a serious matter. We also note that the correspondence was deeply disrespectful of colleagues, in which case it is irrelevant whether he acted for himself or a client.

1(d) Insight

[23] We have already referred to the practitioner's insight in relation to comments made by his referees and the strong submission as to lack of insight is made by Ms Davenport. While we give credit to Mr Eichelbaum for his acknowledgement that his behaviour was unacceptable, we are left in some doubt as to whether he appreciates how unacceptable it was.

1(e) Deterrence

[24] Ms Davenport referred us to the Tribunal's decision in *Horsley*[5] where we discussed general and specific deterrence. While we accept that it is important that other practitioners are fully aware that the conduct will not be tolerated, we do not consider that this is a case where suspension is required for specific deterrence purposes. We accept his counsel's submission that the effect of the disciplinary proceedings upon Mr Eichelbaum has been considerable. We also have reached the view that this really represented a "*meltdown of this practitioner*" in a stressful situation where relationships, which had previously been quite close and crossed the boundary into personal relationships had totally broken down. We would not expect Mr Eichelbaum to find himself in this situation again.

[25] For all of the above reasons, we determined that suspension was not necessary to achieve the purposes of the legislation and would have been a disproportionate response to this conduct.

Issue 2

Compensation

[26] On behalf of the complainants Ms Davenport sought two awards of compensation: $8,400 in respect of Charges 1 and 2; and $24,000 in respect of the composite Charges 4 and 6. There was considerable argument as to the admissibility of documents forming the basis for these claims, mainly the legal fees of the complainants' advisors, for fees incurred in relation to the conduct under consideration, and the disciplinary process. Mr Waalkens objected to the production for a number of reasons. He objected to an award of compensation generally, given that the parties were still in litigation with each other over some of these very issues.

[27] Having retired to consider the matter the Tribunal did not in the end agree to accept the documents sought to be provided because we had reached the view that a s 156(1)(d) award was not appropriate in these circumstances. Thus we considered any documents relating to the claim would not be relevant. Our reasons for refusing compensation are that we would not want to encourage complainants to

[5] *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47.

seek separate legal advice for a process which was effectively handed over by them to the complaints service of the New Zealand Law Society upon making of the complaint. This could in the Tribunal's view, lead to duplication of costs and unnecessary complications in what is supposed to be a "*more responsive regulatory regime*". In our view it risks working against the streamlined process which the legislation provides, and the higher courts have emphasised (for example, *Orlov.*[6])

[28] The second reason for rejecting compensation is that advanced by Mr Waalkens that we would not want to pre-empt findings in any of the proceedings (now amalgamated in the High Court) between the complainant and this practitioner.

[29] The application for compensation is therefore denied.

Issue 3

Apologies

[30] Since Mr Eichelbaum has either already apologised or undertaken to apologise to the lawyers involved, we do not consider an order as to apology is required. In relation to the complainant Mr N, having regard to the tone and content of his own communications with Mr Eichelbaum, we are not minded to order any apology to him.

Issue 4

Costs

[31] The costs in this matter have been significant. They amount to over $62,000, not taking account of the Tribunal costs. Ms Davenport seeks two-thirds of the actual costs on the basis that the Standards Committee was successful on three of the five charges (Charges 4 and 6 having been combined). She also made reference to a Calderbank offer, however Mr Waalkens objected to this being considered.

[32] Without reference to the Calderbank offer, we would consider that 50% of the Standards Committee costs is a sufficiently significant financial penalty, particularly given that we propose to order the practitioner to reimburse all of the Tribunal

[6] *Orlov v National Standards Committee and Auckland Standards Committee No. 1* [2013] NZCA 230.

hearing costs. In our view those orders reflect a balanced consideration of the merits and the respective responsibilities of the practitioner who has "offended" and the interests of the profession in maintaining its standards.

[33] We imposed a censure upon Mr Eichelbaum. We regard this, together with a significant costs award, to be a sufficiently significant penalty, particularly if his name is published.

[34] We now refer to the application for name suppression.

Issue 5

Final name suppression

[35] Mr Eichelbaum was granted interim name suppression pending determination of the charges. He now seeks an order making that suppression a permanent order. This is opposed by the Standards Committee. In our decision we noted:[7]

> "As acknowledged by the applicant, quite different considerations arise should any of the charges be proved. The making of this order is not to be taken as any indication in relation to publication following the determination of the charges."

[36] The only further evidence filed in support of this further application, is an affidavit sworn by the practitioner's brother. In it he points to the risk of adverse effects on the career prospects of his two children who are studying law and music.

[37] Mr Eichelbaum's brother further refers to the source of embarrassment which publicity of his brother's actions would bring to him in his own career which is unconnected with the law. Finally Mr Eichelbaum's brother deposes that their father would be deeply affected by publications and that it would be "a source of considerable embarrassment and distress" to him should the findings against his son be published. We accept the submission that where a practitioner has such an identifiable name that his association with a previous highly respected senior legal figure will inevitably attract attention. We do not however accept the submission of

[7] *Re* Mr Eichelbaum [2014] NZLCDT 23, at paragraph [23].

Mr Waalkens, that, beyond the interim order, we ought to follow the *B v R*[8] decision relied upon in that interim decision.

[38] We consider that the affidavit evidence falls significantly short of clearly establishing "incalculable hurt" to other family members. We do not consider it credible to suggest that the reputation of the practitioner's father, as a wise jurist of impeccable values and standards, could in any way be tarnished by a son's behaviour of the sort found by this Tribunal.

[39] Section 240 sets out the balancing act that the Tribunal must undertake, namely "having regard to the interest of any person" against the public interest and being fully informed about a practitioner's conduct and about the disciplinary processes which monitor such conduct.

[40] Whilst we accept that there is a risk that Mr Eichelbaum's reputation as a barrister may suffer on the publication of his name, the public and the profession have a right to be properly informed about a practitioner's conduct where it has been found to be below accepted professional standards.

[41] The *Hart* decision made it clear that:

> "A Tribunal or Judge deciding whether to order suppression is exercising discretion which, in a disciplinary context, must allow for any relevant statutory provisions as well as the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression. The likely particular impact of publicity on that party will always be relevant, but it is untenable to suggest that professional people of higher public profile, such as the applicant, have anything approaching a presumptive entitlement to suppression."[9]

[42] The further submission made by Mr Waalkens in support of the application is that any release of this decision and the liability decision in its current form might risk breaching suppression orders in other High Court litigation associated with this practitioner or the complainants.

[43] We accept that there will be a need for recall and further redaction of our liability decision in the event that publication is granted. At the penalty hearing a protocol was agreed for that recall and anonymisation which will allow for input from counsel

[8] *B v The Queen* [2011] NZCA 331.
[9] *Hart v Standards Committee No. 1* [2012] NZSC 4, Supreme Court at paragraph [3].

following the circulation of a draft. We annex the draft redacted decision to this decision in order for counsel to comment.

[44] It will have become apparent that we consider that there is insufficient evidence to meet the somewhat higher threshold, following the finding of charges being proved, in relation to name suppression. The presumptive approach of open justice as set out in the authorities referred to has not been displaced.

[45] We note that counsel for the practitioner sought a further month's interim suppression in order to allow for the practitioner to appeal a decision of the kind that we have made. We also note that the practitioner has appealed the liability decision and that there are interim suppression orders operative in relation to that in the High Court which binds this Tribunal. In the event that suppression lapses in the High Court, we make the following orders.

[46] The interim suppression order will continue for one month from the date of release of this decision. In the meantime counsel are to confirm that the annexed draft redacted version of the liability decision is in an acceptable form within 10 days of the release of the decision or make submissions as to any changes required.

Summary of orders

1. Censure.

2. 50% of the actual costs of the Standards Committee are awarded against the practitioner.

3. The s 257 costs are $19,118 and are to be paid by the New Zealand Law Society.

4. The s 257 costs are to be fully reimbursed by the practitioner to the New Zealand Law Society.

5. The interim name suppression order dated 2 May 2014 is continued for 30 days following the release of this decision.

DATED at AUCKLAND this 30th day of March 2015

Judge D F Clarkson
Chair