BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 82

LCDT 014/13

BETWEEN **WELLINGTON STANDARDS COMMITTEE OF THE NEW ZEALAND LAW SOCIETY**

Applicant

AND **CHRISTOPHER KNUTE SKAGEN**

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Ms M Scholtens QC

Ms P Walker

HEARING at Wellington

DATE 28 November 2014

COUNSEL

Mr T Mackenzie for the Standards Committee

No appearance by or on behalf of the respondent

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

[1] Twelve charges of Misconduct have been brought against Mr Skagen. They are summarised as follows:

(a) The "E Charges"

(i) Accepting instructions directly;

(ii) Accepting fees in advance;

(iii) Failure to pay monies received into a trust account;

(iv) Failing to act in a timely or competent manner;

(v) Failing to repay monies.

(b) The "W Charges"

(i) Accepting a fee in advance;

(ii) Failure to pay money received into a trust account;

(iii) Failing to act in a timely or competent manner;

(iv) Failing to repay monies, and in the alternative;

(v) Charging a grossly excessive fee. (This charge was abandoned at the hearing).

(c) The “Investigation Charges”

(i) Failing to permit an investigator to examine accounts;

(ii) Failing to produce records to an investigator.

[2] The charges were laid as Misconduct pursuant to s 241(a) of the Lawyers and Conveyancers Act 2006 (“the Act”). The Committee has alleged, as alternatives, Unsatisfactory Conduct (s 241(1)(b)) or Frequent Negligence or Incompetence (s 241(1)(c)).

[3] The charges relate to the dealings which Mr Skagen had with Mr E and with Mr W and his lack of co-operation with the investigation that followed those dealings.

[4] The practitioner filed a response to the charges and an accompanying affidavit. He engaged in a teleconference on 31 January 2014, but did not comply with the direction to file submissions in response to those of the applicant. He had health problems. He filed a submission which was received on 26 November. He is resident outside New Zealand and did not appear at the hearing of the charges which accordingly proceeded by way of formal proof.

[5] The practitioner practised as a barrister sole in New Zealand during 2011. In February of that year he received and accepted instructions from Mr E to act for him in respect of Family Court proceedings. The practitioner then in May 2011 was contacted by Mr W. He agreed to act for him. Subsequently a solicitor instructed the practitioner to act for Mr W.

[6] Arising out of the matters relating to Mr E and Mr W, the Standards Committee appointed an investigator in August 2011. During the investigation the practitioner refused a request from the investigator to produce his practice bank accounts and later to produce his practice records to the investigator.

The E Charges

[7] There are five charges relating to the practitioner's actions which are set out in para [1](a)(i-v).

[8] In respect of the charge of accepting instructions directly from Mr E, the practitioner asserts that there was an agreement between him and Mr E to represent him in Family Court proceedings for a fixed fee and that he would have a solicitor to instruct the practitioner in pursuance of that agreement. He said that in reaching such an agreement he was not in breach of r 14.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules"). He asserted that there is no provision in any statute that prohibits any of the following:

(a) An agreement with a client to provide future services.

(b) A fixed fee arrangement.

(c) Advance payment for services to be rendered.

[9] He further asserted that there was no statute or rule that requires an advance payment of a fixed fee to be paid into a trust account or that directs a barrister as to the mode of payment of a fixed fee. He said that he accordingly relied on common sense and simple contract law in his manner of instigating business arrangements with clients.

[10] Rule 14.4 of the Rules states:

> Subject to rules 14.6, 14.7, and 14.8, a barrister sole must not accept instructions to act for another person other than from a person who holds a practising certificate as a barrister and solicitor.

[11] The evidence is that the practitioner did receive instructions directly from Mr E. That is in clear breach of the Rule. The practitioner is plainly wrong to claim that his agreement with Mr E obviated the requirement to comply with the Rules. We find the charge proved.

[12] In respect of the charges of accepting fees in advance and of failing to pay monies received into a trust account, the practitioner admitted requesting payment from Mr E of $8,200,00 to be paid in two equal instalments of $4,100.00. Mr E made a payment of $4,100.00 on or about 4 February 2011. The practitioner admitted that he did not place the funds in a trust account and did not retain them until they could be properly debited for fees and disbursements. He placed them in his practice account.

[13] Rule 9.3 of the Rules requires that a lawyer who wishes to receive funds in advance to cover fees must comply with regs 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 ("the Regulations"). Regulation 9 provides that no trust account may be debited with any fees unless a dated invoice has been issued in respect of those fees and is available for inspection or the client has signed an authority specifying the sum to be applied, the purpose for which it is to be applied and is available for inspection.

[14] Regulation 10 provides that all money paid to a practice in respect of professional services for which an invoice has not been issued must be retained in a trust account until it is disbursed on the client's behalf or applied in payment of fees in accordance with reg 9 of the Regulations. Having made the admissions outlined in para [12], the practitioner stated his position to be that his billing practice operated outside the scheme because the funds received are simply payment of an invoice issued in advance.

[15] The practitioner is wrong to take that position. The Tribunal refers to its decision in *Canterbury Standards Committee v Parsons*[1]. The argument in that case was that the practitioner (as here) claimed that he was exempted from trust accounting requirements because he billed clients in advance of work undertaken. The Tribunal held that even if monies were only received on advance issued invoices (as is claimed by the practitioner) there was no exemption from compliance with the trust accounting requirements. It stated at para [41]:

[1] [2103] NZLCDT 48.

> "[41] The Tribunal also wishes to record that even if it had not been the case that some client payments were received prior to invoice, it does not consider that Mr Parsons was free to create a system that attempted to by-pass trust account obligations by billing fees and disbursements in advance. It is one thing to bill clients for work done and disbursements that are to be paid, but another thing completely to always bill clients in advance of work being undertaken, so that it could be said that money has not been received for or on behalf of any person and thus no trust account was required."

[16] We accordingly find that the three charges discussed herein have been proved.

[17] The fourth charge is that the practitioner failed to act in a timely manner. The Tribunal, having found that the practitioner received an instruction direct from Mr E, must conclude that this charge is proved by reason of the undisputed fact that the practitioner simply did not work on the matter.

[18] The fifth charge in relation to the E matter is that the practitioner failed to repay $4,100 to Mr E. Mr Skagen admits that and said that he was unable to make repayment because Mr E breached the contract and there was no requirement on him to repay. The evidence is that the practitioner earlier expressed an intention to make repayment.[2] We agree with the submission of counsel for the Standards Committee that the practitioner's position is disingenuous and dishonest, and in terms of the Act, is disgraceful and dishonourable. We find the charge proved.

The W Charges

[19] There are four charges which the Standards Committee proceeded with and they are set out in para [1](b)(i-iv) above.

[20] The first two charges are that the practitioner accepted a fee of $6,900.00 in advance and that the monies were not placed into a trust account. The practitioner admitted receipt of the monies and that he did not pay them into a trust account. He advanced the same reasons as he did in respect of the identical charges relating to Mr E. The matter requires no further discussion. For the reasons that were applicable to the E matters we find that these charges are proved.

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[2] Bundle of Documents at 15.

[21] The practitioner is then charged with failing to act in a timely or competent manner.

[22] The evidence is that upon receiving instructions from Mr W, the practitioner began to act for him. He then failed to advise Mr W of what was required of him by virtue of the discovery order made in the Family Court at Nelson. He then failed to advise Mr W that he no longer held a practising certificate and could no longer act for him. He failed to arrange alternative representation for his client and did not follow up with what was required for discovery. Mr W did not hear from the practitioner after 21 June 2011. What followed was that on 21 July 2011 the Family Court Judge ordered costs of $800.00 against both Mr W and the practitioner jointly. The practitioner admitted to this.

[23] The allegation is that the practitioner did breach r 3 of the Rules. We find that to be the case and accordingly the charge is proved.

[24] The next charge against the practitioner is that he failed to repay monies to Mr W. He admits that he failed to do so *"due to my inability to repay the monies and the costs award to Mr W".* This matter requires no further discussion. It is proved.

The "Investigation" Charges

[25] The first of the charges under this heading is that the practitioner failed to permit an investigator to examine accounts. On 2 August 2011 Mr Hicks was appointed as an investigator by the Standards Committee to investigate the operation of Mr Skagen's practice. An investigator has wide ranging powers under ss 146 and 147 of the Act and reg 34 of the Regulations which capture all accounts regardless of usage or label. The practitioner admits that he refused to produce his practice accounts with the result that Mr Hicks had to apply to the practitioner's bank to recover the accounts.

[26] The practitioner argued that Mr Hicks exceeded his powers of investigation. Mr Skagen said that the investigator was informed that all payments were fixed fees

and went into his personal account because they were his personal property. He said that Mr Hicks only had authority to investigate trust accounts.

[27] The practitioner is wrong to hold that view having regard to the wide ranging powers that an investigator has as discussed in para [25]. We find the charge proved.

[28] The final charge is that the practitioner failed to produce records to the investigator.

[29] The evidence is that having obtained the practitioner's accounts, the investigator found multiple deposits. The practitioner refused to provide any invoices relating to the deposits and in so doing was in breach of reg 34(b) of the Regulations. The practitioner, while admitting to the fact of his refusal, claimed that all client information that the investigator might have captured was privileged information and beyond the scope of his powers.

[30] The argument for the Standards Committee is that an invoice rendered at the commencement of the relationship would not be privileged when considered against s 54 of the Evidence Act 2006, which provides for privilege to extend to any communication between the person and the legal advisor which is intended to be confidential and made in the course of and for the purpose of obtaining professional legal services from the legal adviser or the legal adviser giving such services to that person.

[31] We agree with counsel for the Standards Committee that the privilege was not the practitioner's to claim. It is for the client to claim. That was not done and of course the clients have made complaints. We reject the practitioner's claim and find the charge proved.

Conclusion

[32] All charges against the practitioner have been proved. We find his conduct to be disgraceful and dishonourable. We agree with counsel's submission that it

borders on cynical and intentional dishonesty that Mr Skagen, having concluded his conduct in respect to Mr E, went on to behave in a similar manner towards Mr W.

[33] We accordingly find him guilty of misconduct on each charge.

Penalty

[34] We have referred to the practitioner's cynical and dishonest conduct. We note also that it was sustained. We have also had regard to the practitioner's arrogance in his response to the investigation. We have no confidence that he will not behave in a similar manner in the future. The public is entitled to protection from him.

[35] The practitioner has been the subject of earlier charges. The Disciplinary Board of the Supreme Court of the State of Oregon found that the practitioner had breached Rules of Professional Conduct by failing to deposit and maintain client trust money in his lawyer trust account until earned and failed to keep sufficient records of client funds resulting in his inability to account for client funds in his possession. He was suspended from the practice of law for 18 months.

[36] That conduct was considered by Wellington Standards Committee 2 in June 2009 and it determined to censure him.

[37] The practitioner's competence and exercise of duty of care to clients was the subject of complaint to Wellington Standards Committee 1 in May 2012. He was censured, ordered to pay compensation, required to reduce his fee and pay costs.

[38] We find that the number, nature and gravity of the charges and the relevant history of similar offending, together with the lack of any insight into his behaviour as demonstrated by his written submission to this Tribunal, lead us to the conclusion that Mr Skagen is not a fit and proper person to be a practitioner. We therefore unanimously order that he be struck off the Roll of Barristers and Solicitors of New Zealand effective immediately.

[39] He will pay the costs of the Law Society and will refund to the Law Society the Tribunals Costs as fixed pursuant to s 257(3) of the Act.

[40] The Tribunal s 257 costs are certified at $2,533.

DATED at AUCKLAND this 9th day of December 2014

BJ Kendall
Chairperson

ADDENDUM

The Tribunal has now received advice as to costs and compensation.

The practitioner will pay the Law Society costs of $22,238.98 and pay compensation to the complainants as follows:

(a) Mr E $4,100.00.

(b) Mr W $7,700.00.

DATED at AUCKLAND this 16th day of December 2014

BJ Kendall
Chairperson