NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 7

LCDT 026/16

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**GANG "RICHARD" CHEN** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms F Freeman

Ms S Sage

Mr W Smith

Mr I Williams

HEARING at Auckland

DATE OF HEARING 24 March 2017

DATE OF DECISION 20 April 2017

COUNSEL

Ms C Paterson for the Standards Committee

Mr G Blanchard for the Practitioner

DECISION OF THE TRIBUNAL IN RELATION TO PENALTY

Introduction

[1] Mr Chen admitted two charges of misconduct.

The first, pursuant to s 241(d) of the Lawyers and Conveyancers Act 2006 ("the Act"), that the practitioner had been convicted of offences *punishable by imprisonment*, that tend to bring the profession into disrepute (the Convictions charge) (emphasis ours);

and secondly, misconduct pursuant to s 7(1)(a)(ii) of the Act, that the practitioner had wilfully or recklessly contravened Regulations 4 and/or 8 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 ("the Regulations") which apply to the practitioner in the provision of regulated services (the Regulations charge).

[2] The practitioner only admitted the latter charge at the level of recklessness, not wilfulness, but having heard the evidence and further oral evidence from the practitioner, the Tribunal considered it was able to consider wilfulness also and will comment on that later in this decision.

[3] The parties had conferred in advance of the hearing and the practitioner supported the penalty submissions made on behalf of the Standards Committee, including the proposed penalty. The Standards Committee had proposed a penalty of:

(a) Censure;

(b) Suspension for 15 months;

(c) A $3,000 fine; and

(d) The costs of the Standards Committee and reimbursement of the s 257 costs to the New Zealand Law Society.

[4] It was accepted by both counsel that the Tribunal was not bound by the proposed and agreed penalty schedule and was entitled to come to its own view on the matter.

[5] For the reasons below we do not entirely endorse the suggested penalty and consider that the period of suspension is insufficiently long to reflect a proportionate response to this offending. These are the reasons for our decision.

Background

[6] In relation to the convictions charge the practitioner had incurred five convictions over a period of six years:

(a) On 2 November 2010, a conviction for driving with excess blood alcohol.

(b) On 30 March 2011, a conviction for driving while disqualified.

(c) On 27 May 2011, a conviction for driving while disqualified.

(d) On 11 March 2016, a conviction for driving with excess blood alcohol.

(e) On 11 March 2016, a conviction for careless driving. (This last conviction is not punishable by imprisonment and was not relied on as part of the convictions charges but does reflect the seriousness of the fourth conviction in that the practitioner was so affected by alcohol he had an accident.)

[7] Each of the offences (a) to (d) is punishable by imprisonment.

[8] In themselves these convictions are serious enough, however we regard the second (Regulations charge) to be even more serious. We adopt the summary of this conduct from Ms Paterson's submissions:

> "As part of yearly applications for the renewal of his practising certificate, the Practitioner completed forms (either in hard copy or online) that required the Practitioner to state whether he had obtained any convictions and to disclose any matters that might affect his continuing eligibility for a practising certificate. The Practitioner did not disclose his convictions. This was in breach of regulations 4 and 8 of the Regulations. The Practitioner completed and signed

> declarations as part of the applications to the effect that the contents of the application were correct. The Practitioner did not disclose the convictions for the period 1 July-30 June for the years 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017.
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> In addition the Practitioner completed an application for approval to practise on his own account on 18 March 2011 that contained similar questions. The Practitioner did not disclose his convictions in this application either."

Seriousness of offending

[9] Any assessment of proportionate penalty begins with an examination of the seriousness of the conduct. In order to regulate the conduct of its members, the professional body, the New Zealand Law Society, must rely on the honesty and integrity of its members to self-report any matter which might reflect on the reputation of the profession as a whole such as these criminal convictions. That is the purpose of the declaration in the application for an annual practising certificate.

[10] In evidence Mr Chen was asked about his understanding of the form. He accepted it was a straightforward set of questions which was understood by him.

[11] Notwithstanding that, Mr Chen's evidence was that he read the word "serious" into the sentence which related to the declaration of having a criminal conviction. He maintained that he did not realise that drink-driving would be regarded as serious. When pressed he also accepted that he had to concede that driving while disqualified was, for an officer of the Court, a serious matter.

[12] In other words, even if we were to give him the benefit of the doubt that he thought "offence" meant "serious criminal offence", he must have realised that his second lot of offending was at a serious level even if he had misunderstood the first. It is straining credulity to think that a qualified lawyer would not understand that "conviction for an offence" would include an offence of driving while disqualified, if not driving with excess blood alcohol. We note that he has admitted the charge that he has sustained convictions which are *punishable by imprisonment* and he undoubtedly knew when he faced the charges in Court that imprisonment was included in the range of penalties available. Our view is, that he could not possibly have thought the offending was not "serious" given that he was at risk of imprisonment.

[13] At one point in his oral evidence Mr Chen made a belated claim that he had sought advice from his partner and/or boss. If he was seriously and genuinely

contending that he took legal advice and he was entitled to rely on this, then it was incumbent on him to provide convincing evidence by calling that person. He did not do so, in fact did not even swear an affidavit to provide any explanation. We regard this belated claim as a somewhat desperate attempt to justify what is actually indefensible, once repeated so many times. Further, the suggestion that he needed to consult another practitioner, would tend to support the notion that Mr Chen knew his convictions were of serious concern. In the absence of a sound explanation, which we found to be entirely missing, the inference to be taken from six years of incorrect information and declarations must be one of deliberate conduct.

[14] Given the repeated failure, in relation to separate sets of applications (one for practising certificate and then later, for approval to practice on own account) we consider it highly unlikely that the practitioner was just recklessly unaware of his obligations.

[15] Had the omission to declare been once or perhaps even twice, we might have accepted the practitioner's actions were reckless. However, we are forced to conclude that the number of documents completed by him over this lengthy period and the number of declarations as to the truthfulness of his statements which he was obliged to make, thus drawing his attention to the need for accuracy, leaves us with the view that his failure to declare the convictions was indeed deliberate and wilful.

Aggravating Features

1. Previous Disciplinary Findings

[16] The practitioner has two adverse findings; the first, in 2009 of unsatisfactory conduct, at Standards Committee level. This involved intentionally backdating a document and falsely claiming to have witnessed the document, both serious matters. The second finding is in 2015 when the practitioner admitted one charge of misconduct relating to having received a $5,000 cash payment from a client and withholding it from his employer for some time, banking it instead into a bank account of an associate. At that time the Tribunal considered the practitioner had been open and accepted responsibility and found him to have been "confused and panicked" rather than dishonest.

[17] Ms Paterson submits that the previous history "*demonstrate a tendency on the part of the Practitioner to attempt to conceal issues rather than address them directly, a tendency which is reflected in the Regulations charge, where the Practitioner has admitted repeatedly failing to declare convictions in reckless breach of the Regulations".* We accept that submission as being a fair reflection of the disciplinary history and a matter which causes us considerable disquiet.

2. Criminal Convictions

[18] Two of the criminal convictions relate to breaches of Court Orders.

[19] Driving while disqualified is a serious matter for any citizen but is in clear breach of a lawyer's obligations as an officer of the Court and to uphold the rule of law, in terms of s 4 of the Act. We accept Ms Paterson's submissions that such flouting of the law will tend to lower the reputation of the profession in the eyes of the public.

3. Duration of the Failure to Disclose Convictions

[20] The misconduct was repeated over a lengthy period of six years, and involved repeated failures on the practitioner's part.

Mitigating Features

[21] The practitioner has cooperated with the prosecution process and admitted the charges at an early stage.

[22] He has ceased practice voluntarily.

Comparison with Other Matters

[23] There are no direct comparisons. The less serious matters of *Pou*[1] and *Rohde*[2] are of little assistance because they did not have the component of the more serious regulatory misconduct.

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[1] *Waikato/BOP Lawyers' Standards Committee No. 1 v Pou* [2014] NZLCDT 86.
[2] *Auckland Standards Committee No. 5 v Rohde* [2016] NZLCDT 9.

[24] The decision of *Parshotam*[3] is of some relevance because Mr Parshotam misled the New Zealand Law Society during the investigation stage in relation to his prosecution and this was treated as a seriously aggravating feature by the Tribunal which increased his suspension to nine months.

[25] Two further cases where strike-off was ordered are *Sharma*[4] and *Poananga.*[5] In the former a false declaration was submitted to the bank by the practitioner in relation to his personal property and therefore involved personal gain. The latter involved false declaration on Legal Aid forms and representations to the Court, both extremely serious matters and clearly more serious than the present instance, but only by a margin.

[26] Finally, there is the decision of *Horsley*[6]*.* In that matter, a charge of misleading the New Zealand Law Society during an investigation, when put with other serious misconduct, led to a three year suspension.

Decision

[27] We have concluded that the level of suspension which ought to be imposed on this practitioner is two years. Mr Chen has indicated that he is not currently practising and is unsure whether he will seek to practice law in the future at any stage. He recognises that he may well be unsuited to this profession, which he entered only under family pressure.

[28] We consider the practitioner also ought to be censured in the following terms:

Censure

[29] Mr Chen, the Tribunal has chosen to censure you, in addition to imposing other penalties. It is very important that practitioners understand that the standards to which they must adhere are those of the professional group of which they are members and are not self-imposed standards. When one person falls below the standards of the profession, the whole profession is harmed. It is a privilege to belong to such a

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[3] *Auckland Standards Committee v Parshotam* [2016] NZLCDT 15.
[4] *Auckland Standards Committee 2 v Sharma* [2015] NZLCDT 12.
[5] *National Standards Committee v Poananga* [2012] NZLCDT 12.
[6] *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47.

profession but it carries with it these broader and collectively-held obligations. You have fallen below these standards and are censured accordingly.

Orders

1. The practitioner is suspended for two years from 24 March 2017.

2. A fine of $5,000 is imposed.

3. He is censured in the terms contained in paragraph [29].

4. He is ordered to pay the Standards Committee costs in the sum of $10,125.

5. The s 257 costs of $2,271 are awarded against the New Zealand Law Society.

6. The practitioner is to reimburse the New Zealand Law Society for the full amount of the s 257 costs.

DATED at AUCKLAND this 20th day of April 2017

Judge D F Clarkson
Chair