NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 12

LCDT 003/09

IN THE MATTER OF	THE LAWYERS AND CONVEYANCERS ACT 2006
BETWEEN	MICHAEL RICHARD DEXTER GUEST Applicant
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 27, 28 July 2009

Venue: Southern Cross Hotel, Dunedin

Appearances: Mr R D Guest in Person (Applicant)
Mr L Anderson for New Zealand Law Society

Chair: Judge D F Clarkson

Tribunal: Mrs A Hinton
Ms T Kennedy
Dr I McAndrew
Mr P Radich

Judgment: Re-issued 6 October 2009

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

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INTRODUCTION

[1] The applicant, Mr M R D Guest, seeks reinstatement of his name to the roll of Barristers and Solicitors of the High Court of New Zealand. Mr Guest was admitted to the Bar and thus entered on the roll on 2 December 1972. He was struck off the roll on 29 July 2002 following the rejection of his appeal to the High Court against a decision of 3 December 2001 of the New Zealand Law Practitioners Disciplinary Tribunal that he be struck off the roll. The onus of proof is on the applicant to be readmitted.

APPLICANT'S BACKGROUND

[2] Mr Guest is now aged 59 years. He was born into a Dunedin family in which his father was a practising lawyer, then a law professor and ultimately the Dean of the Law Faculty at Otago. Mr Guest has three brothers who have all become lawyers. Mr Guest is married with four children, two of whom are practising lawyers. Mr Guest has the support of his wife, his children and his wider family. Mr Guest had a successful university education, and was admitted as a barrister and a solicitor when aged 23 years. After what was for those times an unusually short period of employment as a lawyer Mr Guest commenced practice on his own account as a sole practitioner. His career since has been a roller coaster ride of highs and dismal lows.

[3] From commencing practice on his own account in Dunedin through to the age of 36 years Mr Guest had a commendable career. He had a busy and successful practice as a litigator and he had been elected or appointed to positions of responsibility including being elected a Councillor of Dunedin City Council. He served as Deputy Chair of a Government established committee. At a young age, Mr Guest was appointed a District Court Judge.

[4] Soon after Mr Guest was sworn in as a Judge in May 1987, he took up a permanent position in Invercargill. It appears that while in practice and perhaps

while a Judge, Mr Guest became involved in unsatisfactory investments. He deposes that he was caught when the economic tide went out in October 1987 and thereafter, despite efforts to satisfactorily rationalise his financial position he could not do so. The point where Mr Guest's insolvency was going to become apparent was reached and he elected to resign as a Judge having been advised that that was the proper thing for a Judge who was facing bankruptcy, to do. Mr Guest has sworn that there was no other factor present in his decision to resign as a Judge. The resignation was effective on 8 May 1989 exactly two years after he had been sworn in.

[5] Mr Guest then entered into a scheme of arrangement with his creditors and he avoided bankruptcy. Under the scheme of arrangement he was required to pay each creditor one third of that creditor's entitlement in full and final settlement and Mr Guest says that he did so over a period of six or seven years.

[6] After resigning as a Judge Mr Guest was able to obtain employment with a long established and respected firm of solicitors in Tauranga and so with his wife and children he shifted from Southland to Tauranga. He began his employment in Tauranga on 15 May 1989 and his employment there ceased in October 1991.

[7] Mr Guest's employment in Tauranga came to an unhappy end. Mr Guest has deposed to what happened and we do no more than give the barest of summaries. A client of the firm had at the Tauranga District Court given Mr Guest $100 in cash for legal fees. Instead of paying that money into the Trust account of his employer, Mr Guest kept that sum for himself and did not disclose its receipt to his employer. He did this because he thought he was not being adequately remunerated for the work and travel he was doing for his employer. His client reported the matter to Mr Guest's employer who then confronted Mr Guest. He admitted the transgression, the relationship between Mr Guest and his employer became unstable, a senior retired lawyer was brought in as a mediator and a (confidential) written agreement was reached. The agreement was to the effect that Mr Guest would resign. He accepted and apologised for his misconduct and left the firm in about September 1991.

[8] Mr Guest then returned with his family to Dunedin. On 13 December 1991 Mr Guest gave notice to the then Otago District Law Society of his intention to commence practice in Dunedin and he requested a practising certificate. The Society having heard rumours about events in Tauranga sought to find out whether anything had happened in Tauranga which would bear on the fitness of Mr Guest to practise law in Dunedin. The Society was met with a cloak of confidentiality and in those circumstances considered that it had no choice but to issue a practising certificate. Mr Guest did not disclose the Tauranga events to the Society.

[9] For the period from January 1992 through to December 2001 Mr Guest continued to practise as a barrister and solicitor in Dunedin. He had a very busy practice in which his services were sought after. By 10 March 1992 there had been issues with the operation by Mr Guest of his Trust account such that a formal agreement was entered into between Otago District Law Society and Mr Guest in which Mr Guest agreed to limit the operation of his Trust account. That agreement continued until it was discharged at Mr Guest's request on 17 November 1993. In 1995 a routine audit inspection by the Society showed inadequacies in the way in which Mr Guest operated his Trust account. This is referred to later in this decision.

REASONS FOR STRIKE OFF

[10] The starting point in determining this application must be to examine the circumstances in which Mr Guest was struck off because, as observed in *L v Canterbury District Law Society* [1999] 1 NZLR:

> "The greater the fall from grace the more ground to recover before reinstatement."

[11] In August and September 2001 Mr Guest faced very serious charges before the then New Zealand Law Practitioners Disciplinary Tribunal. The charges arose out of events which began in 1992, the year in which Mr Guest resumed practice in

Dunedin. The various charges against Mr Guest and another co-accused lawyer were heard before the Tribunal in a hearing which lasted for some nine days.

[12] Mr Guest was found guilty of two charges. One of professional misconduct, by taking from his client $25,000 more for his costs than he had the right to charge and two, that he lied to his client when he told her she had been declined legal aid, knowing that not to be true. Mr Guest subsequently appealed against that decision to the High Court. The Appeal was heard by a Full Court on 8 and 9 July 2009. On 29 July 2009 the High Court upheld both the convictions and the penalties imposed and dismissed Mr Guest's appeals accordingly.

[13] The factual background to the offending is somewhat unusual, and was fully set out in paragraphs [13-35] of the decision of the High Court in Mr Guest's appeal: (*M R D Guest v Complaints Committee 2001 of the Otago District Law Society*, Wellington High Court, AP34/02, 29 July 2002). Other than the brief summary and reference herein, we do not propose to recount that background, but we record that before us, Mr Guest accepted completely the judgment of the High Court not just as he must do but also because he now saw it as being *right*.

[14] The High Court had this to say about Mr Guest's offending, at [57-59]:

> "[57] The findings of fact by the tribunal which we have upheld involve a breach and abuse by Mr Guest of the client's confidence and trust. What he told her was a lie. It was a lie against the client's interests and for Mr Guest's personal gain, in that it enabled him to charge a fee which, but for the lie, he could not have charged.
>
> [58] No solicitor who abuses the fundamental solicitor/client relationship in a calculated and deliberate way for personal gain, and to the potential detriment of the client, can be permitted to continue in practice. What the Master of the Rolls said in *Bolton* (para [12] above) says it all. What Mr Guest did fell far below the required standard of complete integrity, probity and trustworthiness. It breaches the first and fundamental rule of Professional Conduct for Barristers and Solicitors.

> [59] This abuse of the solicitor/client relationship of confidence and trust was exacerbated by Mr Guest's deliberate misleading of the arbitrator and of two fellow practitioners, again for Mr Guest's personal gain. If arbitrators and Courts cannot implicitly rely upon what counsel tell them, then our system of justice will be imperilled. If practitioners cannot rely upon what other practitioners tell them in the course of professional dealings, then the practice of law will break down."

APPLICANT'S SUBSEQUENT CONDUCT

[15] After Mr Guest was struck from the Roll of Barristers and Solicitors he was, understandably, devastated. He elected to stay in Dunedin with his family. His wife held a senior position in education and she was able to continue in that position to maintain the family and help the children, some of whom were at the tertiary education stage.

[16] The striking off of Mr Guest hastened what appears to have been an impending financial collapse. It became apparent that once again, he was insolvent. His debts amounted to over $550,000. Included amongst the debts was the substantial amount of more than $200,000 said to be owed to Inland Revenue and amounts (seemingly overstated) said to be owed to the client whose affairs had given rise to the striking off.

[17] As a consequence of the strike off, Mr Guest was required to pay certain monies to the client whose affairs were the subject of the strike off and a Trust which had been established for the benefit of that client and her child. When Mr Guest was unable to pay these monies a claim was made against the Fidelity Fund managed by the New Zealand Law Society. The Fidelity Fund levies law practitioners in New Zealand and uses the funds collected to reimburse clients who have suffered losses on account of the dishonesty of their lawyer. A payment was made from the Fidelity Fund to reimburse Mr Guest's client and her associated Trust. That Fund has not been reimbursed by Mr Guest and there is accordingly a residual situation where the wider body of law practitioners has been required to pay monies to compensate clients for the wrongdoing of Mr Guest.

[18] At the time of the impending financial collapse Mr Guest and his wife had two residential properties, one at Dunedin which was their principal home and another at Wanaka which was their holiday home. Mr Guest's wife having taken independent legal advice made an application to the Family Court at Dunedin to have ownership of the Wanaka property vested in her to the exclusion of Mr Guest. Mr Guest did not oppose that application and it was duly granted, the effect being that the equity which was in the Wanaka property was salvaged by Mr Guest's wife from the financial wreck.

[19] Mr Guest and his wife took immediate steps after he was struck off to sell their principal residence to pay creditors.

[20] Then proposals were developed by Mr Guest and his brother for a scheme of arrangement under Part XV of the Insolvency Act 1967. If such an arrangement is approved by the High Court then an insolvent person has his or her debt reduced down to what can be recovered, those recoveries are required and the balance of the liabilities is in each case extinguished. Such an arrangement requires substantial approval from creditors and it requires full disclosure. In a complicated arrangement which we need not detail an outcome was achieved whereby a family member contributed some $40,000. This was to be shared amongst creditors, the Inland Revenue Department would write off most of its debt, and the Wanaka arrangement would be left alone. This arrangement was approved by the High Court after all necessary notifications and disclosures. Creditors received 10 percent of the debts owed to them.

[21] Mr Guest remained unemployed and without any significant income for two or three years after strike off. He then began to make his way back into the community. He was elected a Councillor of Dunedin City Council in 2004 and again in 2007. He has held responsible positions within Council as a Councillor. He has served on a number of committees, attended many public meetings and has behaved as a responsible citizen would behave.

[22] Mr Guest has taken up employment advocacy work where a law qualification is not needed. He has been a commentator and extensive commentary writer on topics relating to the law. Basically Mr Guest says that he has rehabilitated and redeemed himself while in the public gaze in his home city of Dunedin such that it is appropriate for him to be allowed to return from the wilderness.

FURTHER MATTERS RAISED BY NZ LAW SOCIETY

[23] In a recent decision of the New South Wales Court of Appeal, *Council of NSW Bar Association v Einfeld* [2009] NSWCA 255, the importance of the consideration of facts beyond those admitted or immediately causative of the striking off was confirmed. A full context and examination of behaviour is necessary:

> "14 In *Bridges v Law Society of New South Wales* [1983] 2 NSWLR 361 Moffitt P quoted what he had said in *Law Society of New South Wales v Seymour; Prothonotary v Seymour* (Court of Appeal 14 April 1982 unreported, with which passage Hutley and Mahoney JJA agreed), as follows:
>
>> "Any one of four of the five matters alleged, if established, would call for an order removing the name of the solicitor from the roll. The only purpose of basing the Court's order on more than one such matter is because the conduct of a solicitor is a matter of public concern and when allegations against him alleging professional misconduct have been made they should be openly and fully dealt with. This the Court has proceeded to do today. Moreover the totality of the matters constituting misconduct should be dealt with and recorded on the basis that they could be relevant to any future application for readmission."
>
> 15 Two purposes for dealing with the totality of the alleged matters can be seen to be referred to by Moffit P in *Seymour*: the general public interest and the assistance in relation to any future application for readmission. The latter has been reiterated on a number of occasions: *Prothonotary of the Supreme Court of New South Wales Bar Association v Ritchard* (Court of Appeal 31 July

1987, unreported) at 4-5 (Kirby P); *New South Wales Bar Association v Cummins* [2001] NSWLR 279 at 285 [24] and [25] (Spigelman CJ, with whom Mason P and Handley JA agreed); and *Council of the New South Wales Bar Association v Power* at 459 [10]-[11] (Hodgson JA, with whom Beazley and McColl JJA agreed).

16 The former, the public interest, should not be lost sight of. The roles of the Bar Association (and the Law Society) and this Court in the maintenance of public confidence in the administration of justice and the legal system are to be recognised and appreciated. When, as happens from time to time, a member of the profession so conducts him or herself as to bring disrepute on to the profession, the administration of justice and the legal system, procedures (such as this hearing) should be unquestionably complete in examination of relevant conduct. To do less may lead to a view (even if misguided) that the system operates without a full opportunity for the public examination of such wrongful conduct. This is not part of any process of punishment; rather, it is an aspect of protecting the public and fostering the public interest by maintaining full accountability of those in the profession and involved in the administration of justice.

17 Quite apart from this question of public interest, here, it is important to understand, by reference to the evidence before the Court, the full context and history of the defendant's conduct in order that its seriousness be understood. The commission of an untruth in relation to a mundane and everyday event such as dealing with a speeding offence is the subject of consideration. No one is perfect. People make mistakes, including ones that involve a degree of dishonesty. Sometimes, these mistakes can be made in circumstances where they can be viewed as stupid and, perhaps, uncharacteristic; such mistakes may not, when examined in all their circumstances, reflect profoundly on the overall character of the person involved. Conversely, when placed in context what occurred may be seen as not involving mistake, but as bearing a much more serious character. Thus, it is necessary, here, given the background of the defendant and the immediate nature of the offences, to understand the full context of the material to appreciate the seriousness of what was done and (unfortunately, it must be said) the reflection of the character of the defendant leading to the clear necessity to make the orders for the protection of the public."

[24] In addition to the two charges leading to Mr Guest's being struck off in 2001, the NZLS raised 16 further matters which it urged the Tribunal to consider and weigh against Mr Guest's application for restoration. Of these, five matters post-dated strike-off, while a number of others relatively immediately followed strike-off. They are canvassed below in approximate order of occurrence.

Complaint by Mrs L – 1977

[25] Mrs L filed an affidavit in which she said that Mr Guest had mishandled her divorce application in 1977 resulting in her being publicly labeled an "adulteress" and that he had lied to her in explanation of his mishandling. Mr Guest said that he remembered nothing of the file and that it was likely that the client's unhappiness resulted from a failure of communication between them. He was, he said, only in the mid-20s in 1977, but was experienced enough in that work not to have said what he is alleged to have told his client. No documentary evidence was available to the Tribunal. The Tribunal noted the matter but its occurrence was too long ago to accord it much weight.

The Tauranga Employment – 1991

[26] This incident is referred to in the background section of this decision.

[27] The Tribunal heard evidence of an incident of dishonesty *and rationalization* on the part of Mr Guest, albeit on a relatively minor scale. It is nonetheless an incident to which the Tribunal has to give some weight, both in isolation and to the extent that it might contribute to an observed pattern of behaviour giving rise to continuing concern about Mr Guest's fitness to practice.

The Trust Deed of Restriction – 1992

[28] In terms of an agreement with the Otago District Law Society, as to the operation of his Trust Account, monies for fees and disbursements were not to be held for more than six months without an account being provided to the client; and Mr Guest agreed that his trust account would not be used for investment of monies on behalf of clients, conveyancing, or commercial transactions. The agreement was entered into on 10 March 1992.

[29] In November 1992, Mr Guest was found to have purchased Bonus Bonds on behalf of a client, and to have placed the balance of the client's funds in a matrimonial property settlement matter in an interest bearing bank deposit in breach of the restriction on investment. Mr Guest accepted at the time that he was in "technical breach" of the Deed of Restriction and apologized to the Society, while maintaining that neither matter constituted 'investment' in the conventional sense. There being no further breaches noted, the Deed was discharged by the Society on request in November 1993. Mr Guest's submission to the Tribunal continued to regard the matter lightly. It was noted by the Tribunal, but is not a matter that weighs heavily in the Tribunal's consideration.

The Audit Inspection – 1995

[30] An inspection of Mr Guest's trust account in August 1995 resulted in the auditor reporting to the Otago District Law Society to the effect that two aspects of Mr Guest's trust accounting that were not satisfactory. Fees and disbursements were seen to have been taken or paid from the trust account without sufficient client authorization, proper billing, or other appropriate documentation. Mr Guest replied at length to the auditor's concerns, variously excusing, rationalizing, and explaining individual items in sometimes splendid detail, but ultimately conceding that in some respects the accounting for monies in and out of his trust account did not comply with requirements. Mr Guest committed himself to complying fully in

the future. The matter was finally resolved by the Society receiving advice from Mr Guest's auditor in April 1996 that appropriate systems had been put in place.

[31] Mr Guest submitted that he responded promptly to the auditor's concerns, that he made appropriate concessions and apologies, and that he was given a "clean bill of health" eight months later. The Tribunal sees this matter as contributing to a developing pattern of careless attention to trust fund regulations, a pattern that causes it considerable concern.

Disciplinary Charge – 1996

[32] In February 1996, Mr Guest was found guilty of misconduct and censured by the Otago District Law Practitioners Disciplinary Tribunal for events that occurred in 1994. The 1996 Tribunal considered the offending to be an isolated incident and at "the lower end of a culpability scale". The matter arose from the erroneous payment of $5,200 by a third party into Mr Guest's business account rather than into his trust account to the credit of a particular client. In due course, Mr Guest erroneously overdrew the client's trust ledger when drawing a cheque for $5,200 on that account. What constituted the misconduct was Mr Guest's written assurance to his auditors on 8 March 1994 that the error had been rectified, when in fact it was not rectified until some three weeks later. Mr Guest accepted that his conduct was wrong and that the charge of misconduct was properly laid, but offered in mitigation that he was distracted at the time by significant health issues then being experienced by his teenage daughter.

[33] It was a theme of the evidence before the present Tribunal that Mr Guest has been inclined to respond to pressured situations by engaging in unsatisfactory practices to some degree. While this earlier disciplinary action against Mr Guest is accepted as being at the lower end of the scale and subject to mitigation, it is nonetheless seen by the Tribunal as consistent with Mr Guest's tendency to sometimes make poor choices under pressure.

The Complaint by Mrs R – 2000

[34] Mr and Mrs R were involved in an apparently contentious child custody and access matter. Mrs R resided in Australia. Mr R resided in New Zealand and sought access; he was represented by Mr Guest, and was apparently a friend of Mr Guest. Mr R was disqualified from driving for drink driving and that became an issue in relation to access. Mr R had apparently not had a license for some time and did not obtain one following the expiration of his disqualification from driving. On two occasions in late 1999, Mr Guest assured counsel for Mrs R that Mr R was no longer a disqualified driver, and on one of those occasions said that "I can confirm from my own knowledge that Mr R is lawfully able to drive." On the other occasion, he provided a copy of an expired driver's license. Mr R was at the time not in possession of a valid driver's license. Mrs R lodged a complaint with the Otago District Law Society by letter of 25 October 2000.

[35] Mr Guest was encouraged by the Society to resolve the complaint with counsel for Mrs R, and he did so by acknowledging that he might have been too close to the situation and apologizing. His explanation to the Tribunal was that his focus had been on the lifting of Mr R's disqualification, rather than on whether Mr R had a valid driver's license. He described Mrs R, who he perceived to be strongly opposed to access, in unflattering terms, and the Tribunal was left with the conclusion that his perception of her influenced his conduct at the time. Mr Guest submitted that the matter could not "be elevated to misconduct of kind justifying a major complaint." Perhaps not, but the matter nonetheless contributed to the Tribunal's view of Mr Guest as a practitioner inclined to sometimes make bad choices, including dishonest choices, under pressure.

Allegations Raised by Mr More

[36] David James More, a barrister of Dunedin, filed an affidavit raising two matters of concern in relation to Mr Guest. Mr More subsequently accepted the invitation of the Tribunal to appear and give further evidence. The first matter

raised by Mr More was an allegation that in 1996 Mr Guest had submitted a legal aid application and an invoice for custody and access matters in relation to a client who had no children. Mr Guest reacted strongly to the allegation before the Tribunal. He submitted that the problem had originally occurred through a confusion of files, that the mistake had not been carried forward from the application to the billing, and that the Legal Services Board had accepted his explanation. Mr More did not resile from his evidence under cross-examination. No documentary evidence was available to the Tribunal.

[37] The second matter raised by Mr More amounted to an allegation of perjury by Mr Guest in his evidence to the Law Practitioners Disciplinary Tribunal in the hearing that ultimately led to his being struck off in 2001. Mr Guest testified at the time to having had a conversation over certain matters with Mr More's brother Adrian, now deceased. Mr More's evidence was that he had mentioned the alleged conversation to his brother who had, he said, angrily denied that such a conversation had taken place. Mr Guest denied the allegations before the present Tribunal. He contended that if the situation had been as alleged by Mr More, it would have been acted on at the time, rather than raised seven years later.

[38] Both allegations are of a most serious nature. However, faced with a conflict of oral testimony and an absence of any corroborating evidence, the Tribunal has no choice but to regard the allegations made by Mr More as unsustainable, and to put them outside of matters to be considered in coming to a decision over Mr Guest's application for restoration.

The DNA Diagnostics Complaint

[39] In January 2002, following the strike-off but pending Mr Guest's appeal, the Otago District Law Society received a complaint from DNA Diagnostics Ltd, a laboratory testing company, relating to Mr Guest's non-payment of an invoice for blood tests. The precise dates were not put before the Tribunal but the matter appears to have arisen in 2001. Some 70 percent of Mr Guest's practice had

involved legal aid work and the blood tests were funded by legal aid. At issue were two matters: that the legal aid payment for the blood tests had not been specifically allocated to the particular client ledger in Mr Guest's trust fund accounting, and that the invoice had not been promptly paid upon receipt. The consequence for DNA Diagnostics Ltd was that it became, with others, an unsecured creditor and ultimately received only a fraction of the monies owed to it.

[40] In the final analysis, Mr Guest accepted that DNA Diagnostics Ltd should have been paid out of his business account upon receipt of the invoice, or at the very latest upon receipt of legal aid monies that included payment for DNA tests, and that his business practice was unsatisfactory in respect to this matter. He offered in partial mitigation the turmoil in his practice in the latter part of 2001 leading to his striking-off.

[41] The Tribunal views this matter as at least a careless disregard for meeting financial obligations, and as such one part of a broader picture that gives rise to concern. This particular instance also reflects poorly on the profession that relies on the cooperation and trust of service providers like laboratory testing companies and that also has to carry some weight in the Tribunal's deliberations.

The Complaint by Mr B – 2001

[42] This matter related to events occurring in 2001, and raised in a complaint by Mr B's domestic partner. Mr Guest represented Mr B in respect of criminal charges. In anticipation of the trial, Mr Guest sent Mr B letters dated 21 August 2001 and 26 October 2001 in which he first estimated the cost of legal work at $6,000 plus GST and subsequently specified a quotation of $5,000 inclusive of GST and disbursement, but further to a sum of $200 already paid. An additional $2,500 was paid in September 2001. Both amounts were informally receipted. The second letter was in response to a request from Mr B's partner for a breakdown of costs. Mr Guest advised Mr B that he was entitled to ask for a further breakdown of legal costs, but advised him, in effect, that $5,000 was a good deal.

The letters contained some indicative itemization of likely costs. In the event, only $2,700 was paid. Contrary to Solicitors Trust Account Regulations 1998, no invoices were issued, and monies received were at no point paid into Mr Guest's trust account.

[43] Mr Guest's position was that Mr B was fully aware of and accepting of the position set out in Mr Guest's letter of 26 October 2001, and that the letters were a sufficient invoice for the client and an acceptable form of invoicing to meet the regulations. He continued, he said, to have difficulty accepting that money paid for work in arrears needed to be paid into a trust account. The Tribunal considers this matter, as one of wilful practice outside the regulations, to be of some concern. Mr Guest assured the Tribunal that there would be no reoccurrence of these practices if he were to be reinstated.

The Complaint by Mr F

[44] A similar matter arose following strike-off, with Mr Guest no longer able to represent Mr F in a significant criminal matter. It was the subject of a complaint to the Otago District Law Society in April 2002 by Mr F's new solicitors. Mr F instructed Mr Guest in July 2001. Mr F made five payments totaling $21,000 to Mr Guest. These were generally informally receipted. With the exception of an initial payment of $1,000, these monies were paid in the period 13 August 2001 to 28 November 2001. On August 13 2001, Mr Guest wrote to Mr F dealing with various matters to do with the pending trial, including likely costs. He indicated that "the cost could easily come to something just under $21,000" based on 100 hours of work. He indicated a figure of $30,000 if the requirement reached 150 hours of legal work. It was apparently on the basis of the lower estimate that Mr F paid a total of $21,000 to Mr Guest. In the event, having been struck off, Mr Guest did not complete preparation for the trial nor undertake the trial. When Mr F sought a refund of some monies paid, Mr Guest's position was that each of the amounts paid, totaling $21,000, was for work already completed or completed within a short time after payment. No refund was forthcoming. No invoice was

provided. He recognized, he said, "a moral obligation" to Mr F and hoped to be able to pay him something. A figure of $6,000 was offered by Mr Guest in respect of possible duplication of costs arising out of a new lawyer being instructed. As with other creditors, Mr F received 10 percent of the monies owed him.

[45] Before the Tribunal, Mr Guest attacked Mr F's credibility by reference to the charges of which he had been convicted (indecent assaults). As with Mr B's complaint, Mr Guest's view was that the detailed letter of 13 August 2001 was a sufficient invoice for Mr F, that all monies received were receipted in a manner common at the time, that all payments were for work already or soon completed, and that monies for work past or contemporaneously completed were not required to be paid into a trust fund. He again undertook that there would be no reoccurrence of these practices in the event that he was restored to the roll. As with the complaint by Mr B, the Tribunal considers this matter to be one of considerable concern.

Leaving Clients' Files Unsecured

[46] By affidavit evidence, the Secretary of the Otago Brach of the New Zealand Law Society said that on 21 December 2001, she had been called to Mr Guest's former offices, he having been struck off 3 December 2001, and found Mr Guest's office open and his client files unsecured. The Society stored the files. Mr Guest had not, she said, communicated with the Society about the transition of his files. In his evidence, Mr Guest said that he had cleared and vacated his workspaces, but that file storage was in separate shared space accessible to other tenants. He said that both the offices and his storage area were secured before he left, and that he had never been asked to assist the Society with file transition.

[47] We do not consider that Mr Guest can be held responsible for this state of affairs, particularly when the Society had been slow in arranging collection of files.

The DCC Web Site Entry

[48] Mr Guest's profile on the Dunedin City Council web site was brought to the attention of the Tribunal. The Law Society highlighted that the profile noted Mr Guest's 28 years of experience as a practitioner, including experience as a judge, but made no reference to Mr Guest having been struck off. Mr Guest's position was that he was not responsible for the web site material; and that in any event, residents of Dunedin are aware that he was struck off the roll of legal practitioners.

[49] The Tribunal views the web site profile as inappropriate. Beyond not mentioning the strike-off, it is written in the present tense – "…has attended 450 criminal jury trials…" – and otherwise indirectly conveys the impression that Mr Guest is a practicing lawyer. It is difficult to avoid the conclusions that Mr Guest was aware of the web site content and could have and should have had it amended. He undertook to the Tribunal to now do so.

Complaint of Stephen John Rodgers

[50] By affidavit evidence, Stephen John Rodgers, a Dunedin solicitor, complained that Mr Guest gave contradictory statements, only one of which could be true, regarding his intention to seek restoration to the roll of legal practitioners. Mr Rodgers pointed to a letter Mr Guest had sent to fellow city councilors on 24 November 2008, indicating that he was going to apply for restoration and seeking support, and to a newspaper clipping of 24 November 2008 in which Mr Guest denied having made a decision to so apply. Mr Guest's position was that he should have been more qualified about his intentions in writing to councilors, but that in any event he "makes no apology" for having misled the press on this particular matter.

[51] While absolute honesty is critical in the practice of law, the Tribunal sees this incident as essentially one of political sparring with the press, and not of major

moment in the bigger scheme of things related to Mr Guest's application for restoration.

LEGAL FRAMEWORK

[52] An applicant for readmission to the legal profession must persuade the tribunal that he or she "is of good character and a fit and proper person to practice as a barrister or as a solicitor or both": s.246 Lawyers and Conveyancers Act. The onus is clearly on Mr Guest.

[53] We agree with the Full Court of the High Court *in Leary v New Zealand Law Practitioners Disciplinary Tribunal [2008] NZAR 57* that the following passages underpin restoration applications, albeit expressed in rather more formal language than we might now use.

> (i) "It is well settled by authority that a solicitor is not [removed from the rolls] by way of punishment. He is removed from the rolls because he is deemed unfit to be further trusted with the powers, rights and duties attached to the responsible position of a solicitor of the Supreme Court. He is deprived of that position not by way of penal discipline in respect of offences committed by him, but for the purpose of protecting the public and the administration of justice from the danger involved in the continued authority of a solicitor who by his conduct has shown that he is not fit to be trusted with the possession of such an office. On an application for readmission, therefore, the question whether the period of his deprivation of office has been long enough to constitute an adequate punishment for his offence is wholly irrelevant. The true question is not whether he has been sufficiently punished, but whether his conduct since his removal has been such as to demonstrate to the satisfaction of the Court that he is now a fit and proper person to be admitted as a solicitor, and that he no longer possesses that disqualifying character which was formerly held to exist and to justify his removal from the rolls." Re *Lundon* [1923] NZLR 236, 242-243.
>
> (ii) "It may be that the error, though flagrant, has proved to be a solitary lapse. It may be that after sufficient time has passed Mr Guest can satisfy the tribunal that his purgation is complete, his

> repentance real, his determination to act uprightly and honourably so secure that he may be fairly re-entrusted with the high duties and grave responsibilities of a minister of justice. But that obligation lies upon him, and it is no light one. The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors, or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future." *Ex parte Meagher* (1919) 19 NSWSR 433,437, Supreme Court.

(iii) "The greater the fall from grace the more the ground to recover before reinstatement". *L v Canterbury District Law Society* [1999] 1 NZLR 467, 473.

(iv) If a restoration applicant "relies on a subsequent career of honesty he must show long-continued honesty in circumstances of temptation and opportunity comparable with those which surround the practice of the law". Re *Lundon*, supra.

[54] We are conscious that where a person has been struck-off and therefore not allowed to practise law it may be difficult for them to put themselves in circumstances comparable with those with surround the practice of law, which makes the test referred to in the last passage quoted somewhat difficult at a pragmatic level.

[55] We are conscious generally of the difficulty in proving that where you were not a fit and proper person to practise law, you have rid yourself of the "disqualifying character" (per *Lundon* above) and you now are fit and proper.

[56] Applicants for re-instatement tend to provide numbers of written testimonials and other references from members of the profession, those in authority and members of the public, to prove their case that they are now fit to be trusted with legal office. These testimonials are seldom if ever, provided by way of sworn testimony, are often furnished at the personal request of Mr Guest and usually do not begin by stating that the person is aware of the reasons for the strike-off including recounting of those reasons. This also is somewhat fraught.

[57] In *Leary* we note that there were 81 testimonials supporting the application, including one from a retired judge of the High Court, six from District Court judges, 15 from Queens Counsel, five from the Auckland Crown Solicitors Office, 16 from barristers, 10 from barristers and solicitors and the remainder (approximately 30) from industry and the community. The court concentrated on references from persons who had known Mr Leary over the past 20 years in industry, commerce and in his community activities. These included testimonials from chartered accountants, a former detective superintendent who joined MAF in retirement, former employees who had done well in life with Mr Leary's assistance and an ordained minister.

[58] The court said that: "these testimonials contained unanimous praise for the appellant's probity, honesty, intelligence and industry, sometimes in situations where others may have been tempted not to act honestly". The court also placed reliance on what appeared to be an unsolicited testimonial following widespread advertisement of the application, from the head of the Public Defender Service, who described Mr Leary as a "person who truly regrets his earlier conduct and …. Is fully rehabilitated and …. now able to conduct himself in the manner expected".

[59] The court placed reliance on the submission for Mr Leary that eminent and responsible people would be at pains to ensure that what they said was accurate.

[60] Comments on the testimonials filed on behalf of Mr Guest are referred to under the heading "Letters of Support or Objection".

[61] Mr Guest referred us to a number of cases where lawyers have committed serious wrongs which have resulted in criminal convictions (some where that resulted in a term of imprisonment), and where these lawyers have, after a period of time been permitted to return to the profession. (For example *Boyd 12.8.97 Auckland, Tannahill 15.8.06, Wellington, Hesketh 24.5.99 Auckland* and of course *Leary*.) Mr Guest pointed out that his "offending" had not resulted in any criminal charges.

[62] Mr Anderson, for the New Zealand Law Society, generously submitted that the fact of opposition in itself ought not to be a factor given weight by the Society, but rather that the Society's role was to ensure full testing of the issues relating to the applicant's character. The need for thorough examination of **all** relevant background material in assessing present and future fitness of character has been referred to in relation to the *Einfeld* decision, paragraph [23] above.

[63] Mr Anderson accepted that the relevant principles to be applied were contained in paragraphs 7 to 9 and 43 to 44 of *Leary*.

LETTERS OF SUPPORT AND OBJECTION

[64] Mr Guest draws the Tribunal's attention to the 178 letters or expressions of support, 132 of which had been provided to the Tribunal by him and a further 45 letters came following the public advertisement placed by the Tribunal on the making of this application. In addition to that Mr Guest referred the Tribunal to the letters of support from two very senior members of the profession and two Women's Refuges, filed at the time of his penalty hearing some seven years ago. However, Mr Guest had not thought to have those in any way updated.

[65] Mr Guest is correct when he refers to many of the letters coming from respected members of the community. As he detailed, these include a Bishop, two Mayors, two former Mayors, the Deputy Mayor, two former Deputy Mayors,

Professors, the Deputy Dean of the Medical School, the Otago Chamber of Commerce, the Students' Association, Masters of two Halls of Residence of Otago University, a retired Chief Superintendent and District Commander, a former Minister of the Crown, the CEO of the Canterbury Chamber of Commerce, the Timaru RSA, Teachers, a Principal, a Deputy Principal, a Coroner, Doctors, Dentists, Lawyers, and a "very broad spectrum of the business community".

[66] As the Tribunal views these letters through the lens of whether Mr Guest is a fit and proper person there are some which are of limited relevance. However there are others which do address the very issues to be considered by the Tribunal.

[67] It has to be said that the letters which do not indicate a specific knowledge of the reasons for Mr Guest's strike off must be given less weight. Mr Guest does point out that the publicity surrounding not only his strike off but his subsequently quite public role as a city councillor meant that knowledge of his strike off was "widespread and detailed" and on a "continuing basis" over the subsequent eight years. We accept that is the case, however being referred to as a "struck off" lawyer is somewhat different than being referred to as a lawyer who had lied to his client and misappropriated funds from her and from her child's trust funds.

[68] Many of the letters speak to Mr Guest's energy and hard work as a city counsellor. He is described as "honest", "transparent" and professional. Well-informed letters such as those from the Coroner of Dunedin Mr Conradson expressed the view that:

> "… He has accepted the fact of the misconduct as well as the decisions of this Tribunal and the High Court but has now made major steps towards redemption and acceptance within his community service and willingness to front up to the community, accept his wrongdoing and make amends."

[69] Mr Conradson goes on to say:

> "I further believe that he is acutely aware of the damage that the "strike off" of any practitioner does to the profession at large. He let the profession down as well as the community, his family and himself."

[70] Mr Conradson refers in his letter to … "the obvious good and responsible leadership Mr Guest has shown" as a city councillor. He refers him to him as "a leader in his community".

[71] Other letters referred to Mr Guest's personal qualities of generosity and willingness to help others. A number of clients whom he had represented in the employment-related matters as an advocate, since strike off, commented not only on his competence, but on his willingness to render services for no charge if there was an inability to pay. That also speaks well of Mr Guest's character.

[72] The public advertisement also brought letters of objection. There were few objections from lawyers, four in total, two of which we think Mr Guest correctly characterises as "event-specific" and were subsequently converted into the form of affidavits and considered fully at the hearing. One was from the Legal Ethics lecturer, Ms Mise, whose concerns are recorded later in this decision.

[73] One of the other objectors and subsequent deponent Mr Rogers, has already been covered in this decision.

[74] The other two lawyer objectors were both from Tauranga where, by the conclusion of the hearing, I think it was accepted by all that Mr Guest had not covered himself in glory.

[75] As to the lay objectors only one of these asked to be heard at he hearing and indeed once present at the hearing did not wish to add further to his comments or to respond to Mr Guest's comments on his motivation.

[76] One or two of the objectors expressed the view that no lawyer who has ever been struck off for dishonesty ought to be reinstated. Clearly that is not the test which must be applied by this Tribunal. Other objectors quite evidently have political differences with Mr Guest and again we do not consider that many of the matters raised are of direct relevance to the Tribunal's deliberations. Mr Guest has answered a number of the other objectors in specific terms in a satisfactory way.

EVIDENCE OF "REDEMPTION" AND IMPRESSIONS OF MR GUEST

[77] We consider that to determine whether Mr Guest is a fit and proper person to be restored as a lawyer we need to have an understanding of his character, his motivations and his past behaviour as all of these things are likely indicators of future behaviour. The mere utterance of words of contrition can never be enough; we need to be satisfied that the contrition is deep and real and that the redemption is complete.

[78] We were helped in our assessment of Mr Guest by his conduct of his case in person. He was active for most of the two day hearing when he was either making submissions, being cross examined or responding to submissions made by Counsel for the New Zealand Law Society. We also had Mr Guest's record before us and we believe that his record speaks to what he was to the point where he was struck off.

[79] Mr Guest was a clever, capable, flawed lawyer. He appears to have been confident to the point of over confidence. He became centred on his own interests to the point where he was dishonest with his employer and with his clients. He was financially ambitious and imprudent, particularly with tax payments, to the point where he overreached financially and cost a lot of people a lot of money on two separate occasions.

Lack of Remorse after Strike-Off

[80] Several lines of evidence were led suggesting that Mr Guest had failed to show remorse following his having been struck off in December 2001. In the immediate aftermath of the strike-off, Mr Guest protested that the punishment was too harsh. Mr Guest acknowledges that his statements at the time were truculent but says that the press were aggressively pursuing the story, that he was going through "the most traumatic time of my life," and that he had perhaps taken too much to heart the closing arguments made by his counsel in the disciplinary proceedings. Mr Guest pointed to the lack of similar combative statements following the High Court judgment on his appeal, the lack of any protestations of innocence on being elected to public office in 2004, and his 'open letter' apology to the Otago District Law Society in March 2003. Mr Guest acknowledged that, prior to the present hearing he had not issued a public apology for the matters that resulted in his being struck off.

[81] Mr Guest was invited to address an ethics class at the Otago University Law School in September 2002, and submitted to the Tribunal a letter from the class leader, Professor Richard Mahoney, appreciating his contribution and indicating that he had acknowledged wrong doing. However, affidavit evidence from Selene E. Mize, a senior lecturer at the Law School, who sat in on the class, complained that Mr Guest's presentation to the class had been critical and resentful of the Law Society and its treatment of him, and that he had in effect exhibited some, but insufficient remorse. Mr Guest initially denied most critical aspects of Ms Mize's account of the presentation, and questioned her motives in providing her affidavit. As the hearing progressed, Mr Guest came to accept Ms Mize's account, or in some parts indicate that he could not remember the details of the presentation. He submitted that Ms Mize's account was testimony to the fact that he might still have been unaccepting of his culpability as late as September 2002, but that that was not the case now.

[82] The Tribunal understands the traumatic impact on Mr Guest through being struck from the Roll. We also understand the natural human reaction to engage in self-justification and minimization. In this context however a struck off practitioner who seeks reinstatement cannot have it both ways. An applicant for restoration has to acknowledge his or her wrongdoing fully and unambiguously and in so doing must suffer the risk that such wrongdoing will be seen as disqualifying reinstatement. At the commencement of the hearing Mr Guest appeared to be avoiding the realities of what he had done and showed signs of an underlying feeling that he had been harshly treated by the profession. By the end of the hearing Mr Guest's position had moved and we hope that this was more than a convenient repositioning in response to the way in which the winds were blowing. At times we were left asking ourselves whether Mr Guest fully appreciated the essential authority of the Society and the regulations governing the profession.

Mr Guest's Arrangement with Creditors

[83] Mr Guest acknowledges that, prior to being struck off he was in a financially difficult situation. This was exacerbated by the strike-off, and he came close going bankrupt. At the time Mr Guest had little or no income and substantial liabilities. The Law Society filed and served a bankruptcy petition. Mr Guest, with a financial contribution from his brother, submitted a proposal under Part 15 of the Insolvency Act 1967 returning 10 cents on the dollar to creditors. All but two small creditors endorsed the proposal. Mr Guest was subsequently sued by his counsel in the strike-off proceedings and reached a settlement of that matter. Mr Guest has subsequently relied on the Part 15 arrangement and has not made further efforts to mitigate the losses suffered by creditors.

[84] The refund of fees ordered by the Disciplinary Tribunal that struck off Mr Guest, along with the costs ordered to be paid, were all subject to the creditors' arrangement. The Lawyers Fidelity Fund paid out approximately $30,000 following Mr Guest's being struck off. Mr Guest has taken no subsequent steps to repay those monies to the profession.

[85] Mr Guest's family home was sold in early 2002 with the proceeds applied to the mortgage and bank obligations. The family moved into more modest rental accommodation that house being subsequently purchased in 2003 with family financial assistance. Mr Guest's position was that mortgage payments amounted to less than rental payments on that property. In April 2002, Mr Guest's wife obtained a vesting order from the Family Court vesting the parties' Wanaka holiday home as described above. Mr Guest's position was that the Part 15 arrangement with creditors, financed by his brother, returned more to creditors than would have an arrangement based on his part of the equity in the Wanaka property.

[86] The Tribunal recognizes the financial realities that Mr Guest faced at the time of his being struck off. It accepts that an effort was made to partially accommodate creditors, and that Mr Guest was not in a position to do significantly more at the time. The Tribunal also understands the instinct to protect a 'family base' in the Wanaka house. The Tribunal is nonetheless left with some concern over Mr Guest's choice to make no subsequent efforts to further mitigate the losses of creditors, including the Fidelity Fund, and indeed his own counsel who he accepts so ably represented him in the disciplinary proceedings. The Tribunal is also mindful of the public perception that would attend Mr Guest's return to gainful practice while creditors left in the wake of Mr Guest's previous practice remain unpaid.

[87] We consider that the debt to the Fidelity Fund is in a quite different category from other debts. To put right his dishonesty to his former client (the strike-off offence), this must be repaid. We consider that it is only then that Mr Guest can be said to have truly redeemed himself.

[88] We have looked carefully at the Affidavits which Mr Guest has sworn in connection with his Application and we have carefully observed what he has said in the course of the hearing before us. Mr Guest is adept in the use of language but he has a tendency towards overstatements which sometimes depart from reality and truth. We are left with the feeling that Mr Guest in writing and orally uses words

for the purposes of effect with accuracy and truth at times being secondary. An example of his tendency to make statements for effect is his statement that his *preferring his interests over those of his client was obscene*. This was his description of the events which led to his strike off. The impression could be given that this was a conflicts of interest case where Mr Guest was very remorseful when in reality it was a case where Mr Guest took $25,000 to which he was not entitled and manipulated a situation to allow that to happen.

[89] We note that with the exception of Mr Guest's statement to the media, immediately after the initial strike off order in December 2001 and more recently, in misleading a reporter in December last year, and in failing to ensure that the City Council web site accurately recorded his status, all of the evidence as to Mr Guest's behaviour as a practitioner and a person predated his striking off.

[90] Since then the Tribunal is satisfied that Mr Guest has applied himself energetically and conscientiously to his work as a city counsellor holding positions of considerable responsibility. His re-election corroborates his evidence that he is supported and endorsed by the people of Dunedin as a person who can be entrusted with the sort of responsibility that he has outlined to us. In addition he has undertaken further community work, on behalf of the Victim Support group, and with his role with the Science Fair.

DISCUSSION AND DECISION

[91] We have reached a conclusion that the application by Mr Guest for restoration of his name to the Roll of Barristers and Solicitors should be granted subject to the undertakings referred to below being given.

[92] We have not found the path to this conclusion to be clear and free of difficulties. We accept that the test as stated in *Leary* is whether we are satisfied that Mr Guest has redeemed himself, has accepted his past wrongdoings and has

given us the confidence that he is *...a fit and proper person* to practise as a barrister henceforth. We must not look at past conduct in an unbalanced way and thereby fail to give proper emphasis to the real question which is how do we judge likely future conduct.

[93] We have been heavily influenced by the decision in *Leary*. The influence has been in two respects. First, in *Leary* the principles which we have referred to in this decision in relation to Mr Guest were firmly restated. Secondly, the circumstances of Mr Leary's strike off and subsequent reinstatement have been available to us for comparative purposes.

[94] It is our view that the level of offending of Mr Guest was not as serious as that of Mr Leary. Further, the respective records of Mr Leary and Mr Guest since strike off would tend to suggest that Mr Guest has done more in the way of public service, albeit to a large extent, remunerated public service. We note that Mr Leary waited some twenty years before applying for readmission whereas Mr Guest has applied after seven years. We exercise considerable caution in this comparative exercise recognising that each case has to be judged on its own merits. Nevertheless we see the Full Court in Leary as having set a benchmark to which we must respectfully have proper regard.

[95] In the end we have been satisfied that Mr Guest understands, accepts and does not argue with his past serious wrongdoing but we add that his approach at the commencement of the hearing had less humility to it than his approach at the end. In reaching the conclusion that Mr Guest's name should be restored to the Roll we have relied upon his assurance given to us that he will never again practise as a solicitor nor seek to practise as a solicitor and that his practice will be a barrister's practice conducted on a restrained scale. To ensure that the assurances given by Mr Guest are met we require him to give formal undertakings in the terms set out below and only when those undertakings have been given shall Mr Guest's name be restored to the Roll.

UNDERTAKINGS

[96] The Tribunal requires that the following undertakings be given in writing to this Tribunal and to the New Zealand Law Society as a precondition to Mr Guest's name being restored to the Roll of Barristers and Solicitors:

(1) That he will, by 20 December 2013, have made full reimbursement to the New Zealand Law Society for the amount paid by its Fidelity Fund because of Mr Guest's dishonesty.

(2) Upon his name being restored to the Roll of Barristers and solicitors he will thenceforth practise only as a Barrister.

(3) He will strictly at all times observe the requirements of the "intervention rule" and will not receive any money directly from clients, with all money for his services other than fees or disbursements paid by Legal Services Agency being paid into his instructing solicitor's trust account until the work has been performed and a bill of costs rendered to the instructing solicitor.

(4) That he will for the first 3 years of recommending practice restrict himself to the work outlined by him at the hearing, namely:

  (a) opinion work on the instruction of other solicitors;

  (b) Criminal representation work, including Limited Licence applications;

  (c) District Court duty solicitor work.

Unless he has obtained in advance the consent of President of the New Zealand Law Society to accept instructions of a different nature from those outlined above.

(5) He will not in any circumstances receive monies where they or any part of them are required to be held by him on Trust and he will therefore not establish or operate a Trust account nor have circumstances arise where he should establish or operate a Trust account.

COSTS AND SUPPRESSION

[97] Mr Anderson has addressed us on the issue of costs, Mr Guest may respond within 10 days from the date of this decision to the request for costs. Both Mr Guest and Mr Anderson are to make submissions on the issue of any permanent suppression orders.

D F Clarkson
Chair