IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1435/83

IN THE MATTER of the Law Practitioners Act 1982

BETWEEN ALAN JOHN PICKERING

Appellant

A N D THE AUCKLAND DISTRICT LAW SOCIETY

Respondent

Coram: Barker, J. (Presiding)
Vautier, J.
Tompkins, J.

Hearing: 16th April 1984

Counsel: R.L. McLaren for Appellant
S.C. Ennor for Respondent

Judgment: 16 May 1984

JUDGMENT OF THE COURT

This is an appeal pursuant to Section 118 of the Law Practitioners Act 1982 ("the Act") against part of an order of the New Zealand Law Practitioners' Disciplinary Tribunal ("the Tribunal") made against the appellant, a former solicitor, on 28th September 1983.

By virtue of Section 118(2) of the Act, any appeal to this Court is to be by way of rehearing and to be heard by at least 3 Judges in such manner as may be prescribed by rules of Court. No rules of Court having been made under the 1982 Act, counsel accepted, for procedural details, the Rules of Procedure made through the Rules Committee under Section 16 of the Law Practitioners Amendment Act 1935; these Rules are published in (1936) New Zealand Gazette, p.682. These Rules dealt with appeals from the decision of the Disciplinary Committee of the New Zealand Law Society. They clear need redefinition now that the Tribunal has replaced the Disciplinary Committee.

The appellant formerly practised in Auckland as a partner in a large and old-established firm. On 23rd June 1983, when it was discovered that he had been guilty of serious misconduct in respect of his professional activities, he was expelled from his firm. Fifteen charges were laid against him by the respondent. They alleged the misappropriation by the appellant from various persons and in various ways over a period of 5 years. The sum involved was acknowledged by the appellant's counsel in the course of the hearing before the Tribunal to total $287,000.

Most of the evidence probative of the charges resulted from the investigations of a chartered accountant employed by the respondent, the Auckland District Law Society. However, in one particular series of transactions, after his initial misconduct had been revealed, the appellant volunteered information on another series of unlawful transactions; these might not have been discovered without his revelation.

At the hearing before the Tribunal, the appellant, through his counsel, admitted the 15 charges; he acknowledged that he had been guilty of misconduct in his professional capacity; he did not oppose an order made by the Tribunal under Section 112(2)(a) of the Act, that his name be struck off the roll and a further order that he pay costs to the respondent.

The appellant was, at the time of the hearing, aged 34, married, with a young child. He had been a partner in the Auckland firm for 9 years. He acknowledged that as a result of friendship with a property speculator, he became a speculator himself, buying property, renovating it and re-selling. He did so on a falling market. As a result of losses incurred, he then proceeded to "borrow" money from his clients. He did so in an unauthorised and dishonest way. He claimed that he did not set out with a deliberate plan of deception, but rather that, having embarked on this course, he was unable to extricate himself from the steadily increasing liability.

It was not contested at the hearing before the Tribunal that the appellant had been co-operative, had volunteered information that assisted the investigation, and that indeed some of the matters in respect of which he was charged may not have come to light had he not revealed them himself.

Nor was it contested that, as the result of the appellant's realising property that he owned or in which he had an interest, he has been able to repay the whole of the amount involved in the charges and other matters involving a total payment of $433,000.

There will be no claim on the Fidelity Fund. Including the fines and costs which are the subject of this appeal, and which have not yet been paid, the appellant has incurred or will incur direct expenses totalling $96,040.

The hearing before the Tribunal was in public, under the new regime for discipline in the legal profession, created by the 1982 Act.

Counsel for the appellant also submitted that the appellant was suffering from depression and was close to a nervous breakdown. His most important submission so far as the present appeal is concerned, was to advise the Tribunal that the appellant was to be prosecuted by the Police. Mr Ennor very sensibly acknowledged that members of the Tribunal must clearly have realised that, for defalcations of this magnitude, the appellant would inevitably receive a prison term; such proved to be the case.

Counsel finally submitted to the Tribunal that no further monetary penalty should be imposed because of the appellant's obligations to meet further requirements of his former firm and because of the mitigating circumstances.

In the oral unanimous decision, delivered by the Chairman of the Tribunal, it was held that the facts of all 15 charges were proved; that in each case, the appellant had been guilty of misconduct in his professional capacity; and that he was not a fit and proper person to practise as a barrister and

solicitor. The Tribunal ordered:

(a) That the appellant's name be struck off the roll;

(b) That he pay the New Zealand Law Society the sum of $2,000 in respect of costs and expenses of andincidental to the Tribunal's enquiry; and

(c) That he pay to the respondent the sum of $2,400 for the respondent's costs and expenses of andincidental to its enquiry.

The Tribunal did not make any order about the respondent's expenses under Part V of the Act (i.e. the investigating accountant's expenses); these were eventually paid by the appellant.

The Tribunal, in addition, imposed a fine on the appellant on each of the 15 charges; the fines amount to $23,000. Having regard to the interests of the persons concerned and the public interest, it prohibited publication of the name of any person mentioned in the charges or any evidence other than the practitioner, Albert Lonsdale and Kepa Flats Limited. It prohibited publication of particulars of the affairs of any person which might identify any such person.

The reasoning of the Tribunal was expressed in the following paragraphs:

"Mr Pickering, all the matters with which you have been charged and found guilty involve a gross abuse of the fiduciary relationship which must exist

between a solicitor and his client, or of the confidence which should be placed in the representations or actions of a solicitor. The funds which a client entrusts to a solicitor may be applied by that solicitor only in terms of that client's instructions. In a number of the charges, not only did you act without those instructions, but you used the funds for your own purposes. In at least one case, you acted when there was a conflict of interest between you and your client. You used an alias to conceal and deceive. You falsely altered an agreement to gain a pecuniary advantage for yourself. All the charges concern activities where you were advancing your own personal interests.

Through your counsel you have expressed contrition, remorse, deep regret and apology. This is rightly so, for you have brought dishonour to yourself and to the profession. It is to your credit that you have been helping to straighten everything out. It is possible that some of the matters with which you have been charged may not have come to light but for your own admission. It seems that there will be no ultimate monetary loss to any client or to your former partners because of your own resources. This, however, does not alter the very serious nature of the charges themselves.

The Act provides that this Tribunal may impose a penalty not exceeding $5000 in respect of each charge. The Tribunal views these charges as being generally at the higher end of the penalty scale. However, as there are in all fifteen charges and as, in some cases what might be regarded as one activity or series of activities has been contained in more than one charge, the penalties have been imposed as I have already stated in order to reflect this and the varying seriousness of one activity when compared with another.

The Tribunal considers that these penalties should be paid by you in addition to the penalty which you suffer by being struck off the Roll."

The appellant does not appeal against the striking off order or the orders for costs or the orders prohibiting publication. He submits that, whilst the Tribunal had jurisdiction to impose a fine under Section 112(2)(d) of the Act, it should not have done so when it was known to the Tribunal that the appellant was to be

prosecuted and would almost certainly be sentenced to a term of imprisonment. Counsel also submitted that the Tribunal had failed to give sufficient credit to the appellant for his co-operation; it had failed to give any or sufficient weight to the other penalties suffered by the appellant; and, in particular, that the appellant's legal career was at an end. It had failed to give any or sufficient weight to the fact that full restitution had been made, and it failed to take account of the fact that the appellant had not been in any previous trouble during his professional life. It was submitted that the imposition of substantial monetary penalties, together with the consequences of a police prosecution, exposed the appellant to double jeopardy.

On 11th April 1984, the appellant appeared for sentence before Thorp, J. on two charges of theft and seven of forgery, all arising out of transactions in respect of which he had been struck off. He had pleaded guilty in the District Court and was committed for sentence to this Court. Thorp, J. noted in his sentencing remarks that the fine of $23,000 had been imposed by the Tribunal and he took the fine into account in assessing sentence. There was no alternative course for the learned Judge to have taken.

Mr McLaren sought and was granted, without opposition from Mr Ennor, leave to file an affidavit from the appellant, updating his financial position. This information can be summarised as follows:

The former matrimonial home of the appellant and his

wife has been sold for over $400,000. His wife had issued proceedings in the Family Court under the Matrimonial Property Act 1976. These proceedings were apparently settled by payment to her of $128,110 with which she has purchased a home for herself and her child. Most of the balance was used to pay off the appellant's liabilities to his former firm, including the auditing and investigatory expenses, the uninsured portion of some professional negligence claims and interest. The appellant claims that his only other assets now are an interest with his wife in furniture valued at $5,000 and an interest in a unit in Hawaii which he is endeavouring to sell and which he claims will yield no more than $US10,000.

Mr McLaren advised from the bar that, according to his instructions, the appellant's house property was not acquired through any proceeds of misconduct; the former matrimonial home of the appellant and his wife had been sold at a good profit and the proceeds enabled him to buy the house which has just been sold.

Mr McLaren also pointed out that the fine of $23,000 would go to the Law Society general funds and not to the Consolidated Fund as would any fine imposed on the appellant by the Court. It is worthy of note in this context that in England, the Solicitors' Disciplinary Tribunal may impose a fine of up to £3,000 but any such penalty becomes forfeited to Her Majesty (see Solicitors Act 1974 (Imp) Section 47(2)(c) and Halsbury, 4th Edition, Vol. 44, paragraph 305).

Mr Ennor submitted that the Disciplinary Tribunal

was entitled to impose fines in addition to striking off as a mark of censure to reflect the distaste of the profession for such wholesale breaches of trust and to provide a deterrent precedent for others minded to misappropriate clients' funds.

Neither counsel was able to point to a case where the former Disciplinary Committee had imposed a fine in addition to striking off in circumstances where there had been or was about to be a Police prosecution.

We are of the view that, in all the circumstances of the case, particularly now that it is known that the appellant has received a lengthy term of imprisonment, it is inappropriate that the appellant incur a heavy fine in addition to striking off and obtaining a near to complete indemnity for costs.

The function of imposing a penalty on persons who offend against the criminal law and of assessing any deterrent element in such a penalty, must primarily belong to the Courts. Persons appearing for sentence before the Court come from all occupations and backgrounds; sadly, members of the legal profession sometimes appear for offences involving the misuse of clients' funds. The Court always takes into account, when sentencing a professional person on charges which involve professional misconduct, the fact that he has been cast out of his profession by the appropriate professional body. That body has done its duty to the profession by striking him off and by ensuring that the profession has not suffered financially from his misconduct. It should be left to the Court to decide what other penalty should be imposed in the interests of the wider community.

No doubt there would be cases where the Tribunal could properly exercise its powers to strike a practitioner's name off the roll and, in addition, to impose fines, but in our view that is not the appropriate course for the Tribunal to take where it is aware that the practitioner will be punished by the Courts for the same matters as those with which he is charged before the Tribunal.

Where that is the situation, we consider it more appropriate that the Tribunal should impose those penalties that relate directly to the practitioner's right to practise along with orders that ensure that, where appropriate, he should also meet the costs incurred by the New Zealand Law Society and by the practitioner's District Society in investigating and bringing the charges. But matters of punishment in addition to those matters to which we have referred should be left to the sentences to be imposed in the Court.

This approach is consistent with the general principle of sentencing that where a substantial term of imprisonment is imposed, it is generally not appropriate to impose a fine in addition. This approach would also mean that when the practitioner comes before the Court, the Judge responsible for imposing sentence is not required to take into account a monetary penalty imposed by the Tribunal. No doubt it is appropriate to take into account the other penalties imposed by the Tribunal - such as striking off or suspension and orders for costs - but if the Tribunal has also imposed substantial monetary fines, and if from the Tribunal's decision an appeal is pending, then the

sentencing Judge would be placed in the somewhat difficult position that Thorp, J. was here placed; i.e. having to impose a sentence that had regard to the monetary penalty imposed by the Tribunal, yet being aware that on the hearing of an appeal to the Full Court, that penalty might not survive.

The appeal is accordingly allowed to the extent of deleting Order 2 in the formal order of the Tribunal dated 28th September 1983; i.e. by deleting the fine of $23,000.

The appellant is entitled to costs $250 plus disbursements as fixed by the Registrar, including the cost of printing the appeal books.

R.D. Barker J.

SOLICITORS:

Appellant : Malloy, Moody & Greville, Auckland.

Respondent: Glaister, Ennor & Kiff, Auckland.

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Reserved decision delivered by me on 16 May 1984 at 10.00am.

G.J. MORTIMER Deputy Registrar

JUDGMENT OF THE COURT

Copy received

Mr R.J. Moody for Applic S/N

Mr S. Ennor for Resp. S/N.