IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2480
[2019] NZHC 1384

UNDER	Part 7 of the Lawyers and Conveyancers Act 2006
IN THE MATTER	of an appeal under section 253 of the Lawyers and Conveyancers Act 2006
BETWEEN	BRIAN ROBERT ELLIS Appellant
AND	THE AUCKLAND STANDARDS COMMITTEE 5 Respondent

Hearing: 6 June 2019

Appearances: W C Pyke for the Appellant
P Collins for the Respondent

Judgment: 18 June 2019

JUDGMENT OF MUIR J

This judgment was delivered by me on Tuesday 18 June 2019 at 3.30 pm.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel:
W C Pyke, Barrister, Auckland
P Collins, Barrister, Auckland

Solicitors:
C J Lucas, Sellar Bone, Barristers and Solicitors, Epsom
J Kleinbaum, New Zealand Law Society, Auckland Branch

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Introduction

[1] Brian Ellis appeals a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) dated 23 July 2018, in which findings of misconduct were made under ss 7(1)(a)(i) and 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (the Act).[1]

[2] Although Mr Ellis' Notice of Appeal sought to substitute s 12 findings of unsatisfactory conduct for those made under s 7, his counsel, Mr Pyke, conceded in oral submissions that the charge under s 7(1)(a)(ii) was made out. The appeal from the Tribunal's 23 July 2018 decision therefore proceeds only in respect of the finding under s 7(1)(a)(i).

[3] Mr Ellis also appeals the Tribunal's penalty decision dated 2 November 2018.[2] That decision ordered Mr Ellis' name to be struck off the roll of barristers and solicitors. Mr Pyke submitted that a suspension in the order of 12 months, but ultimately in the Court's discretion, was the appropriate penalty.

Background

[4] The facts relevant to the charges are essentially uncontentious. In August 2009 the complainant, Ms B, instructed Mr Ellis in relation to the establishment of a family trust. The instructions also related to the receipt of dividends on various public company shares which had been held for her by a relative living in Israel and who had since died. There was some dispute about the initial consultation meeting (in terms of identity of parties attending) and about whether Ms B received Mr Ellis' written terms of engagement at that time (or indeed subsequently). These issues were ultimately immaterial, however.[3]

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1 *Auckland Standards Committee v Brian Robert Ellis* [2018] NZLCOT 24 (decision concerning charge).

2 *Auckland Standards Committee v Brian Robert Ellis* [2018] NZLCOT 39 (penalty decision).

3 As to terms of engagement, it was clear that Mr Ellis had, in any event, failed to comply with them. (Clause 6.1 of the terms stated "Ellis Law will send its invoice either as a transaction is concluded or at intervals for ongoing matters", which was inconsistent with the key issue in the case, involving a fee invoice rendered four years and eight months after the last dealing with the client.)

[5] Settlement of the trust did not proceed satisfactorily. There is no evidence that this was through want of diligence or competence on Mr Ellis' part. The principal reason appears to have been Ms B's ability to identify suitable trustees.

[6] On 13 August 2010, about a year after the initial consultation, Ms B received an invoice for $3,715, plus GST and disbursements. Although she says that she was originally given an estimate of $1,500 plus GST, she nevertheless agreed to pay the account.

[7] By 5 July 2011 difficulties with the formation of the trust had still not been resolved and Ms B sent an email to the appellant terminating the retainer. She referenced her inability to identify suitable trustees and the fact that the legal costs were getting beyond her means. She requested a reconciliation of disbursements "so that I complete paying all your due fees". She concluded:

> Due to circumstances and the fact that there is no other solution to my issue, besides setting up a trust (at least that has been my understanding from all our communications) **I have decided to ask you to close my file. I will be coming to collect it from your office. Please ensure it includes the original of Nicole's death certificate and of the legal agreement signed overseas.**
> …
>
> [emphasis in original]

[8] Later the same day, Mr Ellis sent Ms B an email telling her there was still work to be done and setting out his advice which was "simple but firm":

> Get the Probate from Israel. Decide who is to hold the shares – you or someone on your behalf as trustee – and then finalise the outstanding matters. The longer it takes, the more messy and difficult it is likely to become.

[9] On 7 July 2011 Ms B replied:

> Thank you Brian for the points you have raised.
>
> I will reconsider my decisions.

[10] Ms B did not, however, give the appellant any further instructions or indeed make any further contact with him at all in the months that followed.

[11] On 22 June 2011 Mr Ellis rendered a second fee invoice for $810.18. Ms B gave evidence at the hearing that she did not receive this. It was paid by deduction from dividend payments previously credited to the trust account operated by Mr Ellis.

[12] Nothing further happened. Ms B did not call to uplift her file and the Tribunal found that no legal work was thereafter undertaken by Mr Ellis. In the several months that followed, however, various small dividend cheques totalling $2,528.42 were received on Ms B's behalf and banked to the trust account. The last of these was on 12 October 2011, by which date Ms B had notified all relevant companies of alternative arrangements. I am satisfied that if the contract of retainer had not earlier terminated, it did so at or about that point.

[13] However, Ms B was unaware of these receipts until 9 March 2016, when she received a letter from Mr Ellis as follows:

> Attendances
>
> You will recall we last corresponded in 2012 in relation to various matters concerning your affairs.
>
> Since September 2010 we have received dividends from you, we have sent you letters of advice from time to time as well as extensive emails. However, on looking at our files, we note we have never finalised matters. Nor have we received instruction from you as to how to deal with the balance of your trust fund.
>
> We now enclose our account for our professional services. We also enclose a statement. You will see there is a balance of $932.79 remaining on deposit. We suggest you let us know where you would like this sum deposited to avoid additional costs accruing.

[14] The attached account was for $1,300 plus GST, plus disbursements of $75 and $12.50 for, respectively, "office services" and "photocopying/fax". The total of the account was $1,595.63. The account noted that it had been "debited from balance held on account." A statement of account was included showing the balance payable.

[15] On 22 March 2016 Ms B wrote to Mr Ellis disputing the account. She said she had given no instructions since July 2011 and in fact had attended to all outstanding matters herself. She described Mr Ellis' correspondence as a surprise, particularly in relation to the account and said that he had no right to deduct it from monies held on

her behalf. She also took exception to what she described as the "veiled threat of additional costs". She asked for the full amount received by Mr Ellis to be remitted to a nominated account.

[16] There was no response. Ms B therefore wrote again on 29 May 2016 stating, among other things, her "hope for a quicker response and transfer of the money owed to me". Again, there was no response. On 15 August 2016 she therefore sent a registered letter, requesting payment. In it, she described Mr Ellis' failure to answer previous correspondence as disappointing and criticised him as "very unprofessional" for requesting immediate responses from her but failing to respond himself. She also sought provision of any letter of engagement held by him and relevant timesheets. She reiterated that "you had no instructions from me to do any work".

[17] By November 2016 Ms B had still not received a response from Mr Ellis and therefore made a complaint to the Lawyers' Complaint Service of the New Zealand Law Society. That resulted in two payments to her from Mr Ellis, the first on 29 November 2016 (being the net $932.79 plus interest), and the second, three days later, when he refunded the $1,595.63 fee account. At the hearing of the charges against him, he further committed to repayment of the $810.18 referred to in the June 2011 account which Ms B said she had never received. Ultimately this occurred, albeit only after the Tribunal ordered him to do so.

The Tribunal's findings

Decision concerning charge

[18] In its decision concerning charge, the Tribunal acknowledged the following admissions by Mr Ellis:

(a) That he should have communicated with Ms B sooner than March 2016, having not heard from her since her email message of 5 July 2011 and that he had let her down in failing to report in a timely fashion about the receipt of dividends after that date.

(b) Effective follow up of Ms B would have been achieved by accounting to her as required by reg 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations) and by similar obligations accepted in his terms of engagement.

(c) That his fee invoice of 9 March 2016 was substantially unjustified and contained elements of duplication of the earlier invoice dated 22 June 2011.

(d) That he delegated much of his trust accounting and administrative responsibilities to staff members.[4]

(e) That he was not well acquainted with the Regulations.

[19] The Tribunal then addressed the charges as follows:

> [32] The respondent's responsibilities towards [Ms B] arise by virtue of the fact that he held trust money for her. Regulation 3(1) of the Regulations defines client as including any person on whose behalf money is held by the practice. Section 110 of the Act creates obligations on a practitioner in respect of money received on behalf of any person. It follows that the respondent had obligations towards [Ms B] regardless of whether or not she continued to be a client or that the respondent saw himself as a fiduciary. He held money on her behalf as a person and thus the obligations created by the Regulations and s 110 of the Act arose.
>
> [33] The Tribunal takes into account the cumulative effect of the respondent's breach of the Regulations; the admitted substantially unjustified fee of March 2016 and the length of time over which the breaches occurred. It reaches the conclusion that the charge of misconduct under ss 7(1)(a)(i) and 7(1)(a)(ii) is established.

Penalty decision

[20] In its penalty decision, the Tribunal described Mr Ellis' misconduct as including persistent failure to comply with his reporting obligations, adverse dealings with his client's trust funds, and deduction from those funds of a fee which he acknowledged was unjustified and contained elements of duplication. It reviewed his extensive disciplinary history, noting his suspension in 2018, and the fact that, in that

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4 The decision recounts that Mr Ellis considered himself sometimes let down by them.

context, the Tribunal had found his previous offending was significantly aggravating. In respect of subsequent repayment of the disputed fee and balance held, it noted the Standards Committee submission that this was only at the point a complaint had been made to the Complaints Service, and that Mr Ellis had failed to respond to three earlier communications. It also noted that at the time of the penalty hearing Mr Ellis had not yet refunded the $810 which he had earlier agreed to.

[21] The Tribunal recognised that, in terms of penalty, the relevant principles were those set out in *Daniels v Complaints' Committee 2 of the Wellington District Law Society*[5] and *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*,[6] namely, that its intervention was to be the "least restrictive" and that it was to consider:

(a) The nature and quality of the misconduct established in the particular case.

(b) Previous disciplinary history, including earlier misconduct of a similar type (as a possible indicator that striking off is the only effective means of ensuring protection of the public in the future).

(c) Any evidence of remorse or insight.

(d) The need for deterrence.

(e) Any aggravating or mitigating features.

[22] It concluded that Mr Ellis was not a fit and proper person to remain a practitioner and was therefore appropriately struck off the roll. It did so for the following reasons:[7]

(b)[8] The fee rendered in June 2016 was unjustified (as acknowledged by him) and closely bordered dishonesty;

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5 *Daniels v Complaints' Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
6 *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103.
7 Penalty decision at [10].
8 Paragraph [10] does not include a subparagraph (a).

(c) His prior disciplinary record is an aggravating feature in that not only are there seven findings against him, but those findings relate to similar conduct and display a pattern of disregard for principles, the rules and regulations and past decisions;

(d) That prior disciplinary history demonstrates that Mr Ellis lacks insight into his professional obligations;

(e) The tribunal cannot have confidence that similar conduct will be avoided in the future. There is a risk of re-offending;

(f) There is a clear need for deterrence and protection of the public.

[23] Mr Ellis was also ordered to pay the $810 he had formerly agreed to within five working days and to pay the costs of prosecution and of the Tribunal.

Submissions on appeal

Findings in relation to charges

[24] Mr Pyke's written submissions proceeded on the basis that all of the conduct captured in the Standard Committee's Charging Document was appropriately regarded as "unsatisfactory conduct" – that is, "not so gross, wilful, or reckless as to amount to misconduct" within the terms of s 241(d) of the Act.

[25] As indicated, that position was reconsidered in the course of the hearing. During it, Mr Pyke accepted that Mr Ellis' ongoing failure for approximately four and a half years, to comply with the reporting requirements in reg 12(7) of the Regulations (relating to the annual requirement of trust account balances) did constitute a wilful or reckless contravention of the Regulations and therefore misconduct in terms of s 7(1)(a)(ii) of the Act.

[26] However, he strongly submitted that none of Mr Ellis' alleged defaults or actions constituted conduct which lawyers of good standing would reasonably regard as "disgraceful or dishonourable" within the terms of s 7(1)(a)(i).

[27] He criticised the Tribunal as expressing a conclusory opinion in respect of s 7(1)(a)(i), submitting that there was scant reference to any aspects of the conduct said to support the finding, other than the so called "cumulative effect" of Mr Ellis'

breach of the Regulations, the "admittedly substantially unjustified fee of March 2016", and "the length of time in which the breach has occurred."[9]

[28] He explained that to the extent the Tribunal's subsequent penalty decision appeared to infer deliberate overcharging or even false invoicing (having described the fee as one which "closely bordered dishonesty"):

(a) No such allegation was made in the Standards Committee's Charging Document.

(b) Any such allegation required commensurate proof.[10]

(c) Although Mr Ellis acknowledged that his invoice of 9 March 2016 substantially duplicated the previous invoice dated 22 June 2011 (already paid by deduction), the evidence was that this occurred through error and want of care on Mr Ellis' part, not dishonesty in the sense either of deliberate overcharging or false invoicing.

[29] He referred in particular to the exchanges in cross-examination where Mr Ellis explained that the "green copy" of the 22 June 2011 invoice was not, for some reason, placed on the file and indeed that he was only able ultimately to recover the invoice from a duplicate file held in his accounts department and stamped "ENTERED". As a result, Mr Ellis said that when he came to prepare the 2016 account there was "nothing to check against" so that he simply went from the account previous (the $3,715 plus GST invoice raised in 2010).

[30] Mr Pyke further explained that beyond the duplicated component of the 2016 invoice, Mr Ellis had maintained that the fee was justified, having regard to subsequent receipt and banking of five dividend cheques and review of some annual reports.

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9 Decision concerning charge, at [33].

10 In which context Mr Pyke submitted that although the standard of proof under s 241 of the Act is the civil standard of proof on the balance of probability, this must be flexibly applied, and that the Courts have consistently required stronger proof for allegations of dishonesty or criminal conduct, referring to *Z v Dental Complaints' Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105] – [107] and [118].

[31] He therefore submitted that a finding of dishonesty or conduct bordering dishonesty was not open on the evidence.

[32] Next, he submitted that the Tribunal's findings did not take account of the overall circumstances and history of the case, including competent representation by Mr Ellis in what were difficult circumstances. He emphasised that there was no finding of, or basis for a finding of, any inadequacy in his overall provision of legal services.

[33] Against that background, he therefore submitted that the finding of disgraceful or dishonourable conduct was a "hard and unjustified finding" not supported by evidence or cogent reasoning.

[34] Finally, he submitted that it also took no account of the fact that Mr Ellis had repaid the 9 March 2016 invoice by the time of the Tribunal hearing and had offered to repay the June 2011 invoice also.

Penalty

[35] Mr Pyke's principal submission in relation to penalty was that if a finding of misconduct is upheld by this Court (as is now inevitable in light of his concession), it is important that the basis of the finding be identified. He submitted that if based simply on a reckless breach of the Regulations then, despite Mr Ellis' previous history, an additional suspension (cumulative on that imposed in 2018) would appropriately meet the consumer protection purposes of the Act. In that respect, he said that the conduct "did not point to a lost cause". He said that this was a case of "passive receipt of modest funds coupled with an irresponsible losing sight of his obligations to follow up with Ms B", but that the conduct was not so egregious as to warrant the ultimate sanction. He emphasised that the fee raised in 2016 was refunded and submitted that this was not taken into account by the Tribunal, except negatively in the context of Mr Ellis' delay in doing so. He submitted it cannot be in the public interest for the Tribunal to have no favourable regard to a practitioner making amends simply because it is done during a complaint process.

[36] He further submitted that insofar as the Tribunal found a "persistent failure" to comply with reg 12(7), this was artificial, because it suggested that Mr Ellis had turned his mind to the matter on multiple occasions and deliberately not complied with the Regulation. He submitted that there was no conscious mishandling of her affairs from 2011-2016. Rather, as the Tribunal observed, the file simply "lay dormant".

[37] Next, he submitted that the Tribunal's finding that Mr Ellis failed to "acquaint himself" with his most basic of trust accounting responsibilities inferred generic problems across his practice, when the only evidence was of his failure to do so on the specific occasion alleged.

[38] Finally, he submitted that in respect of the disciplinary history, this was before the Tribunal in respect of the 2018 charges and yet was not considered sufficient at that time to justify a striking off. Moreover, the 2018 charges resulted in a suspension for considerably less than the statutory maximum,[11] so that when the current charges were added to the previous charges there remained significant headroom short of the ultimate sanction.

[39] In summary, he contended that despite his poor disciplinary history, Mr Ellis should be given the opportunity to try to redeem himself professionally and that a further lengthy period of suspension would adequately "drive home" the message that he must take much more care in respect of his professional obligations, even when the amounts involved are relatively modest.

The statutory and regulatory framework

[40] The relevant provisions are those in ss 7, 12, 110(1) and 241 of the Act and reg 12(7) of the Regulations. These are set out below.

> **7 Misconduct defined in relation to lawyer and incorporated law firm**
>
> (1) In this Act, misconduct, in relation to a lawyer or an incorporated law firm,—

[11] Six months and 12 days as opposed to a statutory maximum of 36 months (s 242(1)(e) of the Act).

(a) means conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—

(i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or

(ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or

(iii) that consists of a wilful or reckless failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject; or

(iv) that consists of the charging of grossly excessive costs for legal work carried out by the lawyer or incorporated law firm; and

(b) includes—

(i) conduct of the lawyer or incorporated law firm that is misconduct under subsection (2) or subsection (3); and

(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

(2) A lawyer or an incorporated law firm is guilty of misconduct if, at a time when he or she or it is providing regulated services, and without the consent of the High Court or of the Disciplinary Tribunal, the lawyer or incorporated law firm knowingly employs, or permits to act as a clerk or otherwise, in relation to the provision of regulated services, any person who, to the knowledge of the lawyer or incorporated law firm,—

(a) is under suspension from practice as a barrister or as a solicitor or as a conveyancing practitioner; or

(b) has had his or her name struck off the roll of barristers and solicitors of the High Court; or

(c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or

(d) is disqualified, by an order made under section 242(1)(h), from employment in connection with a practitioner's or incorporated firm's practice.

(3) A person is guilty of misconduct if that person, being a lawyer or an incorporated law firm, shares, with any person other than another lawyer or incorporated law firm, the income from any business involving the provision of regulated services to the public.

(4) Despite subsection (3), a lawyer or an incorporated law firm is not guilty of misconduct under that subsection by reason only of sharing with a patent attorney (in the circumstances, and in accordance with any conditions, prescribed by the practice rules) the income from any business involving the provision of regulated services to the public.

(5) Despite subsection (3), neither an incorporated law firm nor a lawyer who is actively involved in the provision by an incorporated law firm of regulated services is guilty of misconduct under that subsection by reason only of the incorporated law firm making a distribution to shareholders of that firm.

12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

(b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

(i) conduct unbecoming a lawyer or an incorporated law firm; or

(ii) unprofessional conduct; or

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or

(d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated

law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

241 Charges that may be brought before Disciplinary Tribunal

If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person—

(a) has been guilty of misconduct; or

(b) has been guilty of unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or

(c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; or

(d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute,—

it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.

110 Obligation to pay money received into trust account at bank

(1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—

…

(b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008:

(7) Each practice must provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client's account, and the balance of the client's account,—

(a) in respect of ongoing investment transactions, at intervals of not more than 12 months; and

(b) in respect of all transactions that are not completed within 12 months, at intervals of not more than 12 months; and

(c) in respect of all other transactions, promptly after or prior to the completion of the transaction.

Basis of appeal

[41] This is an appeal by way of rehearing and as such is governed by the principles set out in *Austin, Nichols & Co Inc v Stichting Lodestar*.[12] Accordingly, the parties to the appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. I take into account the specialist expertise of the Tribunal and the benefit it had of being able to observe the witnesses, but I am not required to defer to it.

Discussion

The charges

[42] It is useful to start with the specifics of the charges brought by the Standards Committee. These were that:[13]

> 11. In the circumstances described in the particulars 1–9, Brian Ellis:
>
> (a) Failed to account to [Ms B] for funds held on her behalf, from 5 July 2011, either by reference to Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account Regulations)(sic) 2008, or at all;
>
> (b) Failed in his duty to hold and pay [Ms B's] funds in accordance with her directions, contrary to s 110(1)(b) of the Act;
>
> (i) By failing to account to her for share dividends he held at the time she terminated the retainer on 5 July 2011;
>
> (ii) By failing to account to her for share dividends he received and held after 5 July 2011; and
>
> (iii) By applying dividends in payment of the fee invoice dated 30 August 2010 in a sum exceeding the fee invoice, in the manner described in Particular 4.[14]

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12 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

13 Charging document dated 14 June 2017.

14 This was a reference to application of dividends to the extent of $810.18 in excess of the 30 August 2010 account. Shortly before the Tribunal hearing, Mr Ellis identified a copy of an account dated 22 June 2011, which was filed with his accounts department but not on his correspondence file.

(c) Charged Ms B a fee in the amount of $1,595.63 including GST and disbursements by invoice dated 9 March 2016, in the absence of a contract of retainer permitting him to charge a fee and without having undertaken any authorised legal work; and

(d) Deducted that fee from Ms B's funds then in his trust account; without authority and in the absence of a contract of retainer, and contrary to s 110(1)(b) of the Act;

(e) He engaged in conduct that was misleading and deceptive of Ms B contrary to Rule 11.1.

[43] Significantly, there was no allegation of deliberate overcharging or false invoicing. The highest that the matter is put is that a fee was charged without having undertaken any "authorised" legal work.

[44] In my view, the impugned conduct can effectively be analysed in three subcategories:

(a) The failure for over four and a half years to give an annual statement of trust account transactions and balances – acknowledged to have been a reckless contravention of reg 12(7) and thus to be misconduct under s 7(1)(a)(ii).

(b) The appropriateness of the 9 March 2016 fee having regard to the particulars alleged in [42] 11(c) above.

(c) The appropriateness of the deduction of the fee against funds held having regard to s 110(1)(b) of the Act.

In the context of Mr Ellis' concession, it is only the second and third of these I need to consider.

[45] There is a common underlying issue in respect of both, namely, when did Mr Ellis' contract of retainer conclude? Beyond that point he was not entitled to

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At the hearing Mr Ellis offered to refund the amount also. There were no adverse findings in relation to the 22 June 2011 account.

charge for any services and likewise his former authority to deduct fees against monies held on his client's behalf had terminated.

[46] The Tribunal did not consider itself required to decide this point, because it held that the obligations under both the Act and Regulations continued regardless of whether Ms B was a client. Mr Pyke acknowledges that to be the case, but says there would be no breach of s 110(1)(b) of the Act if the contract of retainer subsisted as at March 2016 because of the entitlement in the 2009 contract of retainer to deduct fees against monies held.

[47] It is not, in my view, possible to say with precision exactly when the contract of retainer concluded. Although Ms B's advice on 5 July 2011 was unequivocal in terms "I have decided to ask you to close my file", when Mr Ellis questioned the wisdom of this she, two days later, replied "I will reconsider my decisions". There was, however, no further communication from her.

[48] Mr Pyke submits that although Mr Ellis should have followed this correspondence up and determined the outcome of Ms B's reconsideration, nevertheless the words cannot be "brushed aside as having no effect on the earlier email". I accept that submission as far as it goes. Possibly for some weeks after 5 July, Mr Ellis could legitimately have waited for Ms B's further advice before considering his retainer terminated. But in my view, within two to three months at the latest, a point had certainly been reached whereby the only appropriate conclusion was that Ms B's earlier termination of instructions stood. And if there was any doubt it was, as Mr Pyke concedes, for Mr Ellis to clarify the position.

[49] Then there is the additional consideration that although five dividend cheques were received in the period July to October 2011, none were received thereafter. Mr Collins is therefore correct in submitting that, at the very latest, the contract of retainer must be considered terminated at or about that time. I would, however, adopt a somewhat earlier point, being at or about the end of August 2011.

[50] It follows that, in my view, there was no authority for the deduction of the 2016 fee which must therefore be considered a stand alone default under s 110(1)(b) of the Act.

[51] As to the 2016 fee itself, the Tribunal's liability finding is that it was "admitted[ly] substantially unjustified". However, in its penalty decision it went beyond that point to say that it was "unjustified (as acknowledged by him) and closely bordered dishonesty".

[52] I have difficulties with this extended finding. For a start, if the Tribunal was to find disgraceful or dishonourable conduct on the basis of borderline dishonesty, that was an allegation that should have been put directly to Mr Ellis in the charging documents. It was not.

[53] Secondly, there is no discussion in either decision about what facets of the account brought it close to dishonesty. There are two potential components which, in my view, need to be separately considered.

[54] The first relates to the acknowledged duplication of the June 2011 invoice. Mr Ellis' evidence in this respect was that the earlier invoice was overlooked because there was no copy on the file. The following exchange with the Tribunal member and senior barrister, Ms Sage, is instructive:

> Q Okay. So would it not be normal practise to commence that account with "to our professional services since June 2011" which was the date the last account went out?
>
> A If I had had this other one on the file the answer would be yes.
>
> Q So you wouldn't go back and check when the last bill was?
>
> A Yeah – as I said before, from looking at the previous green copy on the file and if it wasn't there I had nothing to check against.
>
> Q You wouldn't check the trust account or anything like that?
>
> A Well I would leave it up to the staff to do, foolishly or otherwise, because they prepared the statements based on the invoices I prepare and what is there.

[55] Earlier in his evidence and in response to a question by member Smith, he said:

> … the accounts are in green so when I go to dictate a file, an account and a covering letter, I simply go to the previous account and dictate it from there, so if this account wasn't on the file, I am in strife, I got myself into strife with crossing over on the two accounts and the timing.

[56] The Tribunal does not consider this evidence in its decision. As Mr Pyke submits "mistakes like this can occur".

[57] Although it was not traversed in the evidence, I do have concerns about whether, in any modern office environment, it would be possible to complete an account without looking at a computer-based work in progress total, which should have automatically adjusted at the point the June 2011 account was processed (as it clearly was by virtue of the "ENTERED" stamp on the relevant exhibit). Nevertheless, to the extent it identified borderline dishonesty, the Tribunal, in my view, needed to reject Mr Ellis' explanation with adequate reasons. It did not. Having regard to the seriousness of such a finding and the fact that, whether expressed or not, it was obviously an animating consideration in the earlier conclusion about disgraceful or dishonourable conduct, the Tribunal was, in my view, obliged to identify what specific evidence justified its conclusion and to require that this be stronger than the evidence necessary to satisfy a lesser allegation.[15]

[58] Clearly, there was at least gross carelessness in the way in which the invoice was duplicated. However, I cannot regard myself as satisfied that there was dishonesty or conduct closely bordering dishonesty in respect of this aspect of the account.

[59] I am reinforced in that conclusion by the fact that the charges did not include an allegation of dishonesty or similar conduct. That was not an allegation Mr Ellis was required to meet, nor that he can be expected to have been fully prepared for.

[60] The second aspect of the account (in respect of which the total sum involved is approximately $500) related to the unduplicated attendances subsequent to 22 June 2011. This issue was extensively covered in Mr Collins' cross-examination of Mr Ellis before the Tribunal. He put it to Mr Ellis that, at most, five cheques had been received in the period June to October 2011 and that their receipt would have been attended to

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[15] *Z v Dental Complaints' Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105] – [107] and [118].

by staff and not Mr Ellis. Mr Ellis' response was they still had to be processed and that in the same period he was also required to review various annual reports which he received in relation to Ms B's investments, because she had exhibited disinterest in them and there could, for example, have been rights issues which it would have been remiss of him not to inform her of.

[61] Again, I am unable to say that this constitutes borderline dishonesty. Mr Ellis thought that the retainer was ongoing beyond July. At least at first instance, that was a reasonable conclusion in light of Ms B's expressed intention to reconsider her decision. I accept that there would have been very modest attendances through to the point when he should have realised that the retainer was definitely at an end, although I do not accept that $500 was necessarily a fair and reasonable sum for such attendances. And again the charging document did not allege dishonesty in this respect.

[62] In addition to the specifics of the charges, Mr Collins also encouraged me to look at two facets of the surrounding circumstances. Firstly, he referred to the letter which accompanied the 2016 invoice. He described this as self-serving. I regard that as an accurate description. In particular, Mr Ellis' reference to noting that "on looking at our files … we have never finalised matters" (with the result a further bill was raised), can be contrasted with Mr Ellis' advice in his email of 5 July 2011 that "at the moment your account with Ellis law is cleared". And, unarguably, he never received any instructions from that point.

[63] In addition, Mr Collins criticised the veiled threat that additional costs would accrue unless Ms B gave prompt instructions. However, I am not, overall, prepared to regard the correspondence as materially adding to Mr Ellis' other defaults. Certainly it cannot, in my view, be considered a stand alone particular of disgraceful or dishonourable conduct. Again, there is no particular in the charging document to that effect.

[64] The second contextual element Mr Collins refers to is the failure on Mr Ellis' part to respond to any of the three communications sent by Ms B after the 2016 account

was raised. Mr Pyke acknowledges that this was inappropriate and is a factor which I may take into account in my overall assessment.

[65] Therefore, looking at the totality of the evidence in respect of the 2016 account, I consider:

(a) It was not a false invoice, as such, but it was a product of gross carelessness on Mr Ellis' part (duplicated attendances) and a somewhat optimistic assessment of post-July 2011 attendances.

(b) There is no realistic basis on which Mr Ellis could have regarded the retainer as still existing in 2016 and on which he could therefore have considered himself entitled to deduct the 2016 fee.

(c) There was accordingly a serious breach of s 110(1)(b).

(d) The delay in responding to Ms B's legitimate protests about the deduction reflects adversely on him. The recovery of sums to which she was legitimately entitled was literally a case of her extracting blood from stone.

Conduct within the terms of s 7(1)(a)(i)

[66] The leading New Zealand decision about what constitutes disgraceful or dishonourable conduct remains the High Court Decision in *Complaints Committee 1 of the District Law Society v C*.[16] This decision was under the Law Practitioner's Act 1982 and later parts of the judgment must be read in the light of the new category of unprofessional conduct created by ss 12 and 241 of the Act.[17] Nevertheless, it remains authoritative.

[67] The Court in *C* started its analysis by reference to the so-called "Atkinson test":[18]

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16 *Complaints Committee 1 of the District Law Society v C* [2008] 3 NZLR 105 at [27] – [33].

17 Discussed extensively by Clifford J in *Lagolago v Wellington Standards Committee 2* [2016] NZHC 2867 at [55] – [61].

18 *Auckland District Law Society v Atkinson* NZLPDT, 15 August 1990 at [15].

> Returning to the definition of professional misconduct, in short the default must be of sufficient gravity to be termed "reprehensible" (or "inexcusable", "disgraceful" or "deplorable" or "dishonourable") or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

[68] It did not consider itself greatly assisted by the synonyms referred to in *Atkinson*:

> [30] There is a further difficulty with the *Atkinson* definition. The expressions such as "disgraceful", "dishonourable" (*Myers v Elman* [1940] AC 282), "inexcusable" (*Re a Solicitor* [1972] 2 All ER 811) and "reprehensible" that make up the balance of the *Atkinson* test have been used in various decisions to describe conduct that can amount to professional misconduct. As the Tribunal noted, they described the gravity of the conduct. In reality however, while these words described the seriousness of the misconduct, they revealed little of the type of conduct intended to be caught by s 112(1)(a) [now s 7A(1)].
>
> [Citations omitted]

[69] The Court concluded:

> [33] … The Tribunal erred in directing itself that intentional wrongdoing is an essential element of the charge under s 112(1)(a). While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidence is an indifference to and an abuse of the privileges which accompany registration as a legal practitioner.

Where does this leave me in respect of the s 7(1)(a)(i) finding?

[70] I have criticised the finding in relation to borderline dishonesty. Nevertheless, the failure to identify a duplication in respect of attendances previously billed and paid for by deduction represents such a high level of carelessness as, in my view, to connote indifference by Mr Ellis to the responsibilities of his profession. Such conclusion stands alone, but is fortified by my assessment that, in any time recorded environment, Mr Ellis had to be in a position, if he had put his mind to it, to calculate accurately the value of unbilled services.

[71] The default was, in my view, then seriously compounded by the way in which a deduction was taken from the dividends accruing four years earlier. In the absence

of any communication from his client over such an extended period, the only legitimate conclusion available was that his contract of retainer had come to an end and he had no such entitlement. I conclude that when, to his probable surprise, he realised there was a sum of a little over $2,500 held on Ms B's behalf, his attitude was very much "I will have a bit of that" irrespective of his legal obligations, which were at that stage to account to his client for the full sum. A significant breach of s 110(1)(b) was involved.

[72] It was then further compounded by Mr Ellis' failure, for a period approaching nine months, to repay the amount and indeed his persistent failure to even answer the client's escalating correspondence over that period.

[73] I conclude that, cumulatively, such actions are more appropriately described as constituting dishonourable conduct than they are unsatisfactory conduct. I therefore find that the Tribunal was correct in concluding that there was misconduct within the terms of s 7(1)(a)(i).

[74] In saying that, however, s 7(1)(a)(i) misconduct clearly captures a significant range of actions/defaults from theft and actual dishonesty through to serious negligence evidencing an indifference to or abuse of the privileges of the practitioner. And as is well recognised, s 241 does not create a hierarchy of offences.[19] The various grounds for disciplinary action are conceptually different and the full range of sanctions provided to the Tribunal by s 242 may be applied to all of these conceptually different types of conduct. A finding under s 7(1)(a)(i) does not therefore carry any presumption that the practitioner will be struck off.

[75] I therefore turn to decide whether such outcome was appropriate having regard to:

(a) The acknowledged misconduct under s 7(1)(a)(ii).

(b) The Tribunal's finding under s 7(1)(a)(i), which I have ultimately upheld albeit critical of some elements of the decision as discussed.

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19 *Lagolago v Wellington Standards Committee 2* [2016] NZHC 2867 at [52].

Penalty

[76] The statutory criterion for striking off is that the practitioner is not a "fit and proper person to be a practitioner".[20]

[77] The relevant factors in assessing a lawyer's fitness to remain in the profession are comprehensively set out in the decision of Winkelmann J (as she was then) and Lang J in *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*.[21] They are:

(a) The nature and quality of the misconduct found to be established in the particular case.

(b) Previous disciplinary history including evidence of earlier misconduct of a similar type, which may be an indicator that striking off is the only effective means of ensuring protection of the public in future.

(c) Any evidence of remorse or insight.

(d) The need for deterrence.

(e) Any aggravating or mitigating factors.

[78] The jurisdiction is prophylactic not punitive. The paramount consideration is what is necessary to protect the public adequately in the future. Deterrence also has a legitimate place. So too is the opportunity to foster rehabilitation in appropriate cases. As the Full Court of the High Court observed in *Daniels v Complaints Committee 2 of the Wellington District Law Society*:[22]

> Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. In the end, however, the test is

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20 Law Practitioners Act 2006, s 244(1).

21 *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [181] – [189].

22 *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850 at [22].

> whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practice for a fixed period will be required.

[79] Applying the factors identified in *Hart* to the present case I make the following comments:

(a) The nature and quality of misconduct

[80] I have already discussed this at length and no additional discussion is required. The case involves acknowledged recklessness in adherence to basic trust account obligations and a finding of dishonourable conduct in relation to the raising, processing and aftermath of the 2016 account.

(b) Previous disciplinary history

[81] It is on this aspect that the Tribunal largely focused. Indeed, three of its five reasons for finding Mr Ellis not to be fit and proper relate to it. Likewise, Mr Collins' submissions focussed substantially on this point.

[82] Mr Ellis has a most unsatisfactory disciplinary history. It is necessary to recount this in some detail because the authorities establish that, particularly when previous offending has similarities with the index offending, this may be a strong pointer to the fact that the practitioner "has not learned from past mistakes and sanctions" and that therefore the prospects of rehabilitation do not "bode well".[23] I therefore summarise each of the previous disciplinary findings.

(i) Ellis v Auckland District Law Society[24]

[83] The charges related to events in 1992 when Mr Ellis was a director of Air Nui. He made payment from the trust account without first clearing the airline's cheques. They were subsequently dishonoured, with the result that the trust account became significantly overdrawn. Mr Ellis paid off all trust account balances except for the

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[23] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [236].

[24] *Ellis v Auckland District Law Society* [1998] 1 NZLR 750.

largest single sum, which was ultimately met by a combination of Mr Ellis and an unknown benefactor. The Court noted that in the five years since the offending he had conducted his practice in an exemplary manner and there was no question about subsequent compliance with trust account regulations.

[84] The Tribunal ordered his suspension for one year and that he pay costs of $194,949. On appeal, the suspension order was discharged and he was censured and fined $5,000 because of delay between the time of the offending and completion of the hearing. The costs order was upheld.

(ii) Complaints Committee 2 of ADLS v Ellis[25]

[85] This complaint followed Mr Ellis' conviction for an offence under the Serious Fraud Office Act 1990 (SFO Act). The offence involved destruction of documents which had been the subject of a notice under s 9 of the Act, compelling their production. He was found to have shredded documents and deleted computer files which were the subject of the notice. The Tribunal regarded Mr Ellis as coming perilously close to being struck off. It said:

> He teeters on the brink. His lapse may be less serious than one of dishonesty but it remains very serious indeed in a member of a profession whose reputation depends on trust. As said in *Bolton* "a striking off order may not necessarily follow in such a case, but it may well"… in the end, exercising that fine balance, the Tribunal's view is that Mr Ellis has not fallen over the precipice. He remains teetering. He will continue to remain teetering. If anything further occurs he will fall. He should know that.

[86] In the result, he was censured and ordered to pay costs and required to make his practice available for inspection at six monthly intervals for three years.

(iii) Complaint 2294, Auckland Standards Committee 2 – 18 April 2012

[87] The subject matter of the complaint was a breach of undertaking to pay a defined percentage of deposits held in his trust account to the purchaser's solicitor in a property transaction. The required amount was $177,846.90 but Mr Ellis only paid $162,591.54.

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25 *Complaints Committee 2 of ADLS v Ellis* NZLPDT, 12 March 2003.

[88] The Standards Committee found unsatisfactory conduct and ordered him to pay $15,255.36 to rectify the omission. He was also ordered to contribute to the purchaser's legal costs in the sum of $1,500, fined $1,500 and ordered to pay costs of $1,000.

(iv) Complaint 4044, Auckland Standards Committee 2 – 18 April 2012

[89] Mr Ellis acted for an individual (M) and a company (W) on instructions concerning asset protection. He also acted for the M Family Trust in an unrelated property transaction. On 20 April 2009 he rendered a fee invoice of $3,277.69, together with $4,646.25 relating to a barrister's fee, a disbursement to Mr and Mrs M personally. They became insolvent in July 2009. Subsequently, and while acting for the M Family Trust in the sale of a property from which proceeds were available, he told the trustees he would not give effect to the sale transaction until he received an authority to pay his outstanding invoice from the proceeds. Mr Ellis' trustee company was a trustee of the M Family Trust. Mr M complained that his family trust was effectively being held to ransom.

[90] The Standards Committee found unsatisfactory conduct as a result of inappropriately holding funds of one client to extract a fee payable by another and refusing to sign an A & I form until the fee was paid. The Committee found that Mr Ellis placed his personal interest ahead of his clients' interests and had failed to respond to correspondence in a timely manner.

[91] He was ordered to refund the retained money, fined $1,500 and ordered to pay costs of $1,200.

(v) Complaint 8152, Auckland Standards Committee 3 – 26 March 2014

[92] Mr Ellis acted for borrower clients in a financing transaction. The client subsequently defaulted and a PLA notice was served on Mr Ellis' office as a registered office of the company. A dispute arose about service of the PLA notice and the borrower mortgagors issued proceedings to restrain a mortgagee sale. Without authority, Mr Ellis provided a mortgage broker with a copy of an email he had sent to

the clients notifying them of service of the PLA notice. The clients claimed a breach of the confidentiality obligations in r 8.

[93] The Standards Committee found unsatisfactory conduct and fined Mr Ellis $10,000 and ordered him to pay costs of $2,000.

(vi) Complaint 10244, Auckland Standards Committee 3 – 7 October 2014

[94] Mr Ellis had acted for borrower clients in a farm refinancing transaction. He prepared and submitted to a non-client guarantor a document acknowledging the terms of the guarantee, stating that the guarantee had been explained and that he (the practitioner), had disclosed a conflict of interest. That was found to be untrue and Mr Ellis knew it to be untrue. In the same transaction, Mr Ellis accepted a reduction in the term of the loan which had the effect of increasing payments.

[95] The Standards Committee found unsatisfactory conduct and fined him $3,000 plus costs.

(vii) Complaint 14247, Auckland Standards Committee 2 – 13 July 2016

[96] Mr Ellis held client funds in his trust account, despite a request by the client for these to be released. The amount involved was $7,999.38. The client complained about the retention and about overcharging.

[97] The Standards Committee found unsatisfactory conduct. Mr Ellis was ordered to reduce his fee from $16,845 to $11,400 and ordered to release the funds to the client. He was censured, fined $3,000 and ordered to pay costs.

(viii) Auckland Standards Committee 3 v Ellis [2018] LCDT 4 and 25

[98] The Tribunal found Mr Ellis guilty of misconduct for acting in circumstances of conflicting interests and duties in breach of rr 5.4 and 6.1. The most serious aspect of his conduct involved a finding that he was wilful and reckless. He had not acquainted himself with the laws relating to conflicting interests and duties. Had he done so, he would have been aware that a bare disclosure of a possible conflict and

suggestions of independent advice were not sufficient. Rather, his personal interests were such that he was absolutely disqualified from continuing to act.

[99] Mr Ellis was suspended for six months and 12 days. The penalty decision included a censure in terms which amounted to a severe rebuke for his failure to comply with the Rules of the profession.

[100] It is apparent from the decision that the Tribunal did not have before it at least one of the previous disciplinary findings – namely, that relating to his criminal conviction under the SFO Act.[26]

[101] The Tribunal considered that absent his previous history, the misconduct would not have persuaded it to suspend him, but the previous offending was a significantly aggravating factor and that "nothing less than suspension was a proper reflection of the seriousness of the offending history of the misconduct itself".[27]

[102] In relation to these previous charges, I accept Mr Pyke's submission that the 2003 reference to Mr Ellis "teetering on the edge" cannot be one from which he was never able to recover. Indeed, in multiple subsequent cases his offending was not considered sufficient to invoke this draconian warning. Many were in fact simply dealt with by the Standards Committee and did not make their way to the Tribunal.

[103] Like Mr Collins, I regard complaints 4044 and 1427 as the most relevant in that they likewise demonstrate Mr Ellis' propensity to place his personal financial interests ahead of his obligations under the Act. However, a common feature of all of the offending is Mr Ellis' disregard of the rules and standards of his profession across a wide range of activity, including dealings with trust money, undertakings, conflicts of interests and duty, acting without instructions and breach of client confidentiality. I accept Mr Collins' submission that the disciplinary record reinforces the sort of concerns expressed by the High Court in *Hart* about the inability of repeat offenders to be rehabilitated and consequently the risk of recurrence. Unlike some, Mr Ellis is not in a position to blame youth or inexperience. I agree also that the apparent

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[26] *Auckland Standards Committee 3 v Ellis* [2018] NZLCDT 25 at [6]
[27] *Auckland Standards Committee 3 v Ellis* [2018] NZLCDT 25 at [7].

escalation in the number of professional failings late in his career poses further serious concerns about his fitness to remain in the profession.

(c) Evidence of remorse and insight

[104] The transcript of proceedings records that, at the outset of the case, Mr Ellis indicated through counsel that he was prepared to admit a charge of misconduct under s 7 by virtue of "reckless breach of rules", but that the Standards Committee was unwilling to withdraw the charge under s 7(1)(a)(i). The hearing therefore proceeded on the basis of the denial of all charges. I accept, however, that what was said at the outset is indicative of an element of remorse and insight on Mr Ellis' part. That position, in turn, informed the concession before me on the s 7(1)(a)(ii) charge.

[105] I also regard as relevant in this respect the various concessions made by Mr Ellis during the course of the Tribunal hearing, including that he should have communicated with Ms B sooner than March 2016, that he had let her down, that he had failed in terms of his obligations under reg 12(7), and that his fee invoice was substantially unjustified and contained elements of duplication of his earlier invoice.

[106] Overall, I consider that by the time the matter came to the Tribunal, Mr Ellis showed reasonable insight into his offending, however, the most surprising feature is his failure for a period of almost nine months to action Ms B's legitimate requests for repayment of the full sum owing to her. Demonstrably, he chose to put his own interests ahead of hers in circumstances where he must have been aware of the overall vulnerability of his position, particularly having regard to his disciplinary history. He showed an extraordinary lack of judgment and insight at that point.

(d) Deterrence

[107] The need for this is obvious. Although the sums involved are objectively small, they were significant to Ms B, whose financial position was modest. It is important that practitioners appreciate that the standards of professional conduct do not operate on a sliding scale that disadvantages people in Ms B's circumstances. Indeed, people like Ms B may be those on whom impropriety in relation to accounts most impacts.

(e) Mitigating factors

[108] I accept that repayment of both the disputed account and (following the Tribunal's order) the earlier June 2011 account may be considered a mitigating factor. Mr Pyke must be correct when he says that there would otherwise be no incentive for lawyers to make amends and that this is neither "in the interests of consumers of legal services" nor does it "promote a more responsive regulatory regime".[28] The extent to which I regard the payments as mitigating is, however, significantly reduced by the fact that this only occurred after a complaint was filed (2016 account) and after the Tribunal's penalty orders (June 2011 account).

Summary penalty

[109] I have found this a difficult assessment. I have no doubt that, despite findings of misconduct under both s 7(1)(a)(i) and (ii) of the Act, if these were the first charges Mr Ellis had faced, striking off would not have been an appropriate penalty. I am not satisfied that the Tribunal was entitled to proceed on the basis that the June 2016 fee "closely bordered dishonesty" and as such, this was not a case where presumptively, striking off needed to occur. Had it wished to, the Tribunal could have imposed a lengthy period of suspension (in the order of one year to 18 months cumulatively on the previous suspension). However, it elected to invoke the ultimate sanction, relying substantially on Mr Ellis' past history. That history is indeed desultory.

[110] On any *Austin Nichols*[29] appeal, the appellant bears the onus of satisfying the appellate court that it should differ from the decision under appeal. Having regard to his disciplinary history, Mr Ellis has not satisfied me that I should depart from the specialist Tribunal's finding. He has displayed a consistent pattern of advancing his own pecuniary interests over those of his clients. The Tribunal's conclusion that it "cannot have confidence that similar conduct will be avoided in future" is not one with which I take issue and is ultimately decisive, having regard to the public interest.

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28 Mr Pyke references s 3(2)(b) in this respect.

29 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

Result

[111] I dismiss the appeal.

[112] If any issue as to costs arises and, contrary to my expectations, cannot be resolved between counsel, memoranda may be filed.

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Muir J