IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-004-002361
[2017] NZDC 11949

BETWEEN	KOTARO MIZOGUCHI Appellant
AND	MASANOBU KASHIMOTO ATSUKO KASHIMOTO First Respondents
AND	THE REGISTRAR OF IMMIGRATION ADVISERS Second Respondent

Hearing:	2 June 2017
Appearances:	A Holmes for the Appellant P Davey for the First Respondents A Dumbleton for the Second Respondent
Judgment:	2 June 2017

ORAL JUDGMENT OF JUDGE M-E SHARP

Introduction

[1] Today I have heard an appeal of a decision made by the Immigration Advisers Complaints & Disciplinary Tribunal on 21 November 2016 imposing sanctions on the appellant, Mr Mizoguchi, who was an immigration adviser licensed under the Immigration Advisers Licensing Act 2007 at the time that the complaint against him was made.

[2] The first respondents were his clients. They lodged a complaint with the Authority regarding his conduct. The second respondent is the Registrar of Immigration Advisers responsible for the functions of the Authority. The Registrar

investigated the complaint and lodged it with the Tribunal to be heard after first refining it.

[3] As an aside, the Registrar takes the view that it is not entitled or obliged to prosecute such complaints, merely to investigate them. I hesitate to indicate that is a wrong perception but a thorough reading of the Act would lead me to believe that possibly the Registrar's functions should be interpreted in a wider sense than she has chosen to do in this case and that, therefore, it is possibly her obligation to also prosecute the matter. However, that is irrelevant for the purposes of this appeal decision.

The Appeal

[4] I am advised that the appellant does not appeal all of the sanctions ordered in the sanctions decision because he recognises that he breached certain professional obligations and it was appropriate that sanctions be imposed on him. His appeal (and I am quoting from Mr Holmes' excellent submissions at para 3) is in respect of those sanctions which were disproportionate, based on errors of law and on factual findings which were not open to the Tribunal to make".

[5] Mr Holmes goes on at para 4 to say:

> In brief, there were four critical errors in the sanctions decision that led the Tribunal to impose the excessively high level of sanction imposed.
>
> (a) Firstly, the Tribunal erred in law in finding that no contract was formed between the appellant and the complainants on the basis of an illegality. That is incorrect.
>
> (b) Secondly, the Tribunal's process was unfair and contrary to the requirements of natural justice. The Tribunal had made directions that questions involving dishonesty or misleading conduct would not be considered but imposed sanctions on the basis that the appellant's conduct was of that type.
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> (c) Thirdly, the Tribunal's conclusions that the adviser did not recognise the gravity of the issues, did not take account of the matters he accepted and were disproportionate to the findings.
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> (d) Fourthly, the Tribunal's assessment of costs was in error by taking into account the Registrar's costs when the Registrar did not seek costs and awarded the complainants significant costs in respect of relatively minor attendances.

The Immigration Advisers Licensing Act 2007

[6] The Act provides for the regulation and licensing of persons who provide immigration advice. It has a consumer protection focus and includes a requirement that immigration advisers be licensed with standards of fitness and competence with professional and ethical obligations under a code of conduct. The Authority is established as the regulatory body to administer the licensing regime. The Registrar is part of the Authority with statutory functions and responsibilities. The Registrar may in this role receive complaints about immigration advisers.

[7] Section 44(2) of the Act sets out possible grounds of complaint being negligence, incompetence, incapacity, dishonest or misleading behaviour, or breach of the code of conduct.

[8] The Licensed Immigration Advisers Code of Conduct 2014 includes professional and ethical obligations of which it is said only three were relevant to this appeal, being the breaches alleged in the complaint, that is:

> (1) A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner (here it was claimed that the appellant acted unprofessionally).
>
> (2) A licensed immigration adviser must ensure that all parties to a written agreement sign it or confirm in writing that they accept it; and
>
> (3) Refunds. A licensed immigration adviser must promptly provide any refunds payable upon completing or ceasing a contract for services.

[9] The Registrar has investigative powers in respect of complaints received. Only the Registrar has the power to refer the complaint to the Tribunal for determination. The Registrar files the complaint and gives written notice and copies of the complaint and further information to the complainant and the person complained of. The statement of complaint must particularise each ground of the complaint and identify the relevant part of the Code of Conduct and/or the Act allegedly infringed.

[10] The Tribunal is established by the Act. It has a Chair who is currently the only member. By s 41 the Tribunal's functions include making decisions on matters about immigration advisers that are referred to the Tribunal by the Registrar under s 48.

[11] The Tribunal has the power to regulate its own conduct or procedures but that power is subject to the Act and any regulations. It is subject to a requirement that the complaints must be heard on the papers although reserving a discretion to the Tribunal to request further information or request that any person appear before the Tribunal to make a statement or provide an explanation.

[12] In regulating its procedures regarding the hearing of complaints, a practice note dated 23 May 2013 was issued by the Tribunal including the requirement for the Registrar to particularise the grounds of the complaint. Overriding its ability to regulate its own procedures and conduct, however, the Tribunal must act in accordance with the principles of natural justice and the empowering statute.

Sanctions

[13] Naturally, after hearing a complaint, the Tribunal has different options open to it. It may determine to dismiss or uphold it but determine to take no further action or uphold the complaint and impose a sanction. The Act sets out the sanctions which may be imposed. They range from caution or censure to cancellation of an adviser's licence. There are monetary penalties, costs or payment of compensation options open also to the Tribunal.

[14] With regard to sanctions, these are the principles to be taken into account by the Tribunal. According to *Z v Dental Complaints Assessment Committee*[1] at 55:

> (a) The Tribunal is to determine facts on the evidence before it and on the balance of probabilities. The test is to be applied with regard to the gravity of the finding.

[1] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1

(b) The purpose of statutory disciplinary proceedings is not to punish the practitioner for misbehaviour but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

(c) There are at least four factors which need to be considered and which may materially bear upon maintaining appropriate standards of conduct (*Juan v Ramos*[2]):

(1) Protecting the public.

(2) Demanding minimum standards of conduct.

(3) Punishment as only a deterrent since the purpose is not punishment.

(4) Rehabilitation.

[15] When practicable, it is considered important to have the practitioner continue as a member of the profession, practising well; *B v B*[3].

Right of appeal

[16] There is only a limited statutory right of appeal of the Tribunal's decisions because the Act provides only for appeal of decisions of the Tribunal to cancel or suspend an adviser's licence, or of a decision imposing sanctions on an adviser; s 81.

[17] The most helpful authority on appeals under s 85 of the Immigration Advisers Licensing Act 2007 remains Priestley J's decision in *ZW v Immigration Advisers Authority*[4] where from para 11 until 15 and then again at para 46 the learned Judge discusses appeals of this type.

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[2] *Juan v Ramos* [2016] NZIACDT 3
[3] *B v B* [1993] BCL 1093 HC Auckland HC 4/92, 6 April 1993
[4] *ZW v Immigration Advisers Authority* [2012] NZHC 1069

[18] At para 12 he said:

> The appeal right is clearly restricted to certain core areas. Decisions of the Registrar in respect of licences are appealable (this includes appeals from Tribunal decisions under s 55 against the Registrar's decision to cancel a licence). Appealable too are decisions of the Tribunal cancelling or suspending licences or imposing sanctions.
>
> [13] Section 84(2) provides that the District Court's decision on an appeal is final.
>
> [14] Section 85 provides a right of appeal to this Court, but only on a question of law when a party considers the District Court's decision is erroneous in law. The case stated procedures of Pt 4 of the Summary Proceedings Act 1957 apply.
>
> [15] Clearly the Tribunal will need to exercise considerable care as it operates within its statutory framework. Its powers in respect of licences and sanctions will impact on the personal and economic interests of practising and potential immigration advisers. The Tribunal can operate as a single person and must make its determination on the papers unless for some reason it exercises its s 49(4)(b) discretion. The rights of appeal to the District Court are limited. On procedural and natural justice issues, of course, the Tribunal's decisions would be subject to judicial review under the Judicature Amendment Act 1972.

[19] And at para 33:

> The Judge's interpretation of s 81(1) was correct. Parliament has conferred a right of appeal to the District Court in respect of only the five s 81(1) categories of decisions made by the Registrar and the Tribunal. An immigration adviser can only contest on appeal the Tribunal's decisions in respect of those five categories. There is no right of general appeal.

[20] And at para 39:

> Obviously, if the District Court, on perusal of the materials before the Tribunal (or in appropriate cases additional materials), reached the view that the Tribunal had been totally wrong in finding a complaint or charge established then justice can be done by quashing any sanctions imposed.
>
> [40] Given that this appeal is the first time the High Court has examined the statute and s 81 I make two observations. The first is the absence of any general appeal right heightens the obligation of the Tribunal to ensure its decisions are correct. Particularly is this the case when it can sit with one member; when there is a statutory obligation for it to deal with complaints on the papers; and when the written English language skills of some immigration advisers before it may be limited. Issues of fairness and natural justice loom large in such situations. Certainly the High Court would not be slow to exercise its inherent and judicial review jurisdictions should the need arise.

[21] And at para 46 of his judgment Priestley J answered the questions posed by the case stated by the District Court and in particular at 3 when answering the questions of the District Court:

> Was the District Court correct the Tribunal's discretion in determining the sanctions against the appellant should not be interfered with unless the Tribunal acted on a wrong principle, failed to take into account some relevant matter, took into account an irrelevant matter, or was plainly wrong?
>
> Answer: Yes, subject to the requirement, on appeal, to assess whether the imposed sanctions are appropriate and not excessive.

My task today

[22] Considering that there is no right of general appeal and that this is a rather more limited type of appeal from a discretion of the Tribunal, I am of the view that the Court should be slow to interfere with the Tribunal's decision unless the appellant can show (and the onus is on the appellant) that the Tribunal acted on an error of law or principle, failed to take account of relevant considerations, took account of irrelevant considerations or was plainly wrong: *Kacem v Bashir*[5] at para 32, which considerations are in line with Priestley J's findings in the decision that I have just quoted from.

[23] Thus, in looking at the Tribunal's decision and the evidence that was before it, this being an appeal by way of re-hearing, I must ask myself whether in respect to the particular areas relied on by the appellant, the Tribunal acted on a wrong principle, failed to take into account some relevant matter, took into account an irrelevant matter or was plainly wrong. I may revisit findings of law and/or fact by the Tribunal prior to its sanctions decision, in other words in its substantive decision, only inasmuch as they explain or elaborate the sanctions decision and reasons for it by the Tribunal.

[24] I must also, in the round, assess whether the sanctions imposed by the Tribunal are appropriate and not excessive. My understanding of the legal position is, therefore, that even if the Tribunal acted on a wrong principle, failed to take into account some relevant matter, or took into account an irrelevant matter or was plainly wrong, if my assessment was that the sanctions imposed were appropriate and not excessive then I should not interfere with the Tribunal's decision.

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[5] *Kacem v Bashir* [2010] NZSC 112

[25] At paras 15 to 19 inclusive of Mr Holmes' submissions he summarises the background to the complaint and, because his summary is consistent with the evidence that I have read, is not contested or objected to by counsel for the respondents, I propose to rely on it in this decision as setting out the true factual background. I will append those paragraphs to this decision.

The complaint

[26] The statement of complaint was filed with the Tribunal on 19 October 2015 and identified two grounds of complaint:

> (1) Breach of cl 18(c) and one of the 2014 code in relation to the written agreement. This was then particularised to refer to the adviser's failure to ensure that he and the complainant had signed a written agreement (in breach of cl 18(c)) and that his request to sign a backdated written agreement was inconsistent with his obligation to be professional (in breach of cl 1).
>
> (2) Breach of cl 24(c) of the 2014 code in relation to a refund. This was then particularised to refer to the adviser not promptly refunding the unused portion of his professional fees and declining to refund them until they signed a backdated agreement.

[27] Whilst the complainants' original complaint sought to pursue allegations of negligence and dishonesty against the appellant, the Registrar elected not to advance those grounds and relied only on those that I have just mentioned.

[28] On 28 January 2016 the Tribunal issued directions calling a telephone conference at which it confirmed the issues to be pursued. At the telephone conference on 11 February 2016 the Tribunal confirmed that negligence and dishonesty grounds would not be pursued and that the Tribunal would only decide the grounds identified in para 4 of the statement of complaint by reference to the particulars in paras 5 to 11 and that the complaint would be heard on the papers. The Tribunal was there referring to the two grounds that I have already spoken of, that is breach of cl 18(c) and one of the 2014 code in relation to the written agreement and breach of cl 24(c) of the 2014 code in relation to a refund.

The substantive decision

[29] The Tribunal's decision as to whether the grounds alleged were made out was made on 30 August 2016 after the Tribunal considered all of the written material which was proffered to it. That written material included a, so called, "Statement of Reply" by the now appellant, naturally the complaint and evidence in support of it elicited by the Registrar which included the complaints of the complainant.

[30] In its decision the Tribunal decided that the appellant had breached cl 18(6) of the code by failing to ensure that the written agreement was signed or confirmed in writing; the appellant had breached cl 24(c) of the code by not promptly providing a refund; the appellant had breached cl 1 of the code by acting unprofessionally in asking the complainants to sign a backdated agreement which was misleading and aggravated by his motivations.

[31] The parties were given the opportunity to provide submissions on the appropriate sanctions and a sanctions decision was issued on 21 November 2016.

Sanctions decision

[32] The Tribunal ordered the cancellation of the appellant's licence and imposed conditions which required that he made payment of all monetary sanctions amounting in total to $21,000 and, if he were to apply for a new licence, required him to complete training and only practice under supervision through a provisional licence for a period of time.

Were there any errors of law made by the Tribunal in its sanctions decision?

[33] It is fair to say that the Tribunal took a rather dim view of the appellant's conduct in respect to not only working or acting for the complainants but in failing to have a written agreement with them or failing to have them enter into a written agreement as the code required. More importantly, it considered it to be very serious that the appellant attempted to procure a backdated agreement and refused to refund disbursements as leverage to have the complainants sign the backdated agreement.

[34] The appellant is of the view (and argues strongly), not withstanding, that the Tribunal had earlier determined only to hear complaints about the unprofessionalism of the appellant and his failure to refund money to the complainants quickly rather than complaints of negligence or dishonesty, in fact when dealing with the appellant during the later sanctions decision, in fact (in a de facto manner), that is exactly what the Tribunal did, according to Mr Holmes.

[35] The Tribunal found at para 46 of its sanctions decision that Mr Mizoguchi's conduct was deplorable. It said:

> He withheld trust funds to try and hide the illegality by pressuring his client to sign a false document. The Act and the 2014 Code of Conduct are designed to prevent the very difficulties Mr Mizoguchi now faces and the Act provides for a range of sanctions including removal from the profession. In this case this was not a simple oversight; it was serious conduct made much worse by Mr Mizoguchi's post breach conduct.

[36] Before that at para 43 the Tribunal had found that Mr Mizoguchi had an illegal contract (this being effectively the oral contract upon which he had proceeded with the complainants because he had not secured a written contract with them before taking their money and starting work for them). The Tribunal went on at para 43 to say, "As the Registrar observes, Mr Mizoguchi could potentially justify fees on a quantum meruit but that is a contractual basis which is affected by illegality." (I interpolate here that quantum meruit is not based on contract, however that is irrelevant).

[37] In the Registrar's view Mr Mizoguchi should not retain any of the fees. At para 44 the Tribunal said:

> Mr Mizoguchi relies on an illegal contract as defined in section 3 of the Illegal Contract Act 1970 so he cannot enforce it. Section 6 of that Act deprives the contract of effect.

[38] At para 45 the Tribunal goes on to discuss how it might validate the contract for the purposes of the Immigration Advisers Licensing Act 2007 under s 7(1) Illegal Contracts Act and, on that basis, determine whether Mr Mizoguchi had an entitlement to some of the fees that he had been paid. In the end, the Tribunal came to the decision that it would not or could not do so but at para 49 said, "Accordingly, the contract remains illegal and Mr Mizoguchi is not entitled to retain the fees he solicited."

[39] These findings of illegality form one of the most important aspects of the appeal that Mr Mizoguchi has lodged. Mr Holmes contends that finding, inter alia, was wrong and prejudiced the Tribunal in regards to the sanctions that it later imposed.

[40] Mr Holmes submits, and I agree, that it is a wrong proposition at law that there was an illegal contract between the adviser and the complainant. The Illegal Contracts Act 1970 provides that contracts which are illegal at law or in equity are of no effect but provides the Courts with the power to grant relief to parties to such a contract. It does not alter the general law as to whether a contract is illegal or unenforceable.

[41] The sanctions decision does not record the basis for the Tribunal's finding of illegality. It would appear that the Tribunal relied upon the contract being contrary to the 2014 code and thus contrary to statute.

[42] As Mr Holmes quite rightly said, there are a number of traditional grounds on which a contract is considered to be illegal at common law such as contracts to commit a crime, tort or fraud on a third party (none of those apply here), and s 3, illegal contract defined, does not include a contract of the type here. Section 3 says:

> Subject to section 5, for the purposes of this Act the term illegal contract means any contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

[43] The fact that a contract may be entered into in breach of statute does not, I agree, make it an illegal contract. More is required. The statute itself must have either expressly or impliedly forbad the formation of a contract or its performance.

[44] The question, however, is how that finding, which I consider to be an error of law, affected the later findings and sanctions imposed by the Tribunal.

[45] Before I engage upon an assessment of that exercise, I indicate with thanks to Mr Holmes, that I rely on and endorse his submissions at paras 38 through 46 about illegal contracts and why the contract here, of an oral nature between the parties, was not illegal.

[46] Mr Holmes went on from that point to argue that by making a finding of illegality the Tribunal was really cloaking findings amounting to dishonesty with a lack of professionalism which was the actual complaint. Mr Holmes says that some of the words used by the Tribunal in the sanctions decision make this evident. For example, the Tribunal referred to the backdated written agreement as a device to hide illegal conduct as a false document and stated that the refund was withheld to pressure the complainant to sign the false document.

[47] Such findings, says the appellant, amount to dishonesty as they equate to the findings of a lack of probity or a person acting in bad faith and not as an honest person would do in the circumstances. Mr Holmes submits that the Court has held that is synonymous with dishonesty under the Act; *Loh v Immigration Advisers Complaints & Disciplinary Tribunal*[6] at 58.

[48] The appellant submits that those findings were not open to the Tribunal given that it had earlier made directions that the complaint to be considered by it would not involve allegations of negligence or dishonesty or what was said to be the wider aspects of cl 1 and that by making the findings I have related, which were akin to findings of dishonesty, the Tribunal was in breach of its obligations of audi alteram partem, given that the appellant was not given the opportunity to be heard on these matters.

[49] The appellant submits that the Tribunal's error of law in finding that there was an illegal contract had a significant impact; that impact was to cause the Tribunal to impose excessive sanctions in the round against the appellant.

Findings

[50] I have carefully read both decisions of the Tribunal and particularly the sanctions decision which is the fuller of the two. Nowhere in the sanctions decision

[6] *Loh v Immigration Advisers Complaints & Disciplinary Tribunal* [2014] NZHC 1166

does the Tribunal use the word "dishonesty" and I have reached the view that the Tribunal's attitude to Mr Mizoguchi's conduct, which it described at para 46 of the sanctions decision as "deplorable", was an effort to explain its view that Mr Mizoguchi's behaviour was at the gravest end of unprofessional. In other words, all of the comments that were made, although premised and prefaced on what I consider to be an error of law about an illegality of contract, were designed to make it clear that the Tribunal considered Mr Mizoguchi's conduct to be of the or at the most serious end of a scale of gravity of unprofessional conduct.

[51] At para 42 the Tribunal said, "Those circumstances indicate a high level of fault given the strictly mandated client engagement process." I consider that the Tribunal was entitled to take a very dim view of Mr Mizoguchi's conduct and to find that his actions placed him at the very highest end of gravity for that particular type of offending.

[52] I am not at all sure why the Tribunal considered that it needed to make a finding on the oral contract between the parties being illegal because to me it is and was quite irrelevant. That being so, all that the Tribunal had to do in respect to the contract between the parties upon which both acted was to consider whether it was unprofessional, what the gravity of the appellant's conduct was, where it sat on a scale, and what the appropriate sanction for that was.

[53] In other words, I do not consider that the Tribunal was equating the appellant's conduct with dishonesty and certainly not because of an error of law about the illegality of the contract. I consider that the Tribunal was merely doing its best to express in fulsome terms its view of the gravity of the conduct of the adviser before it.

[54] I note that the first and second respondents have argued that there was an illegal contract and, therefore, the Tribunal made no error of law. I disagree but I repeat that I consider it to be irrelevant and in particular I do not consider that the contract was illegal by implication.

[55] Notwithstanding the issue over the correctness of the Tribunal's view as to an illegal contract, the first and second respondents argue that the Tribunal's determination of sanctions was available and would have been appropriate without

relying on the finding that there was an illegal contract. That has to be the nub of this appeal for me to determine. As said so concisely by Mr Dumbleton, if the Illegal Contracts Act did not apply at all, in the circumstances, any error made by the Tribunal about that had no material effect on the outcome of the hearing.

The sanctions themselves

[56] I now turn to review the sanctions overall with a view to determining whether they are appropriate and not excessive.

[57] In summary, I repeat that the appellant had his licence cancelled with effect on the twentieth working day after delivery of the decision, was prevented from reapplying for any category of licence until the monetary orders made in the decision were discharged by him, was prevented from applying for any licence except a provisional licence until the Graduate Diploma in New Zealand Immigration Advice had been obtained by him and he had practised under a provisional licence under approved supervision for two years after the date of the decision, was formally cautioned, was ordered to pay a penalty of $6500, was ordered to refund the first respondents $8050 and was ordered to compensate the first respondents $1500, was ordered to reimburse the first respondents' costs of $5780.

[58] It is the appellant's strong argument that the sanctions ordered were excessive in the circumstances because primarily they were punitive in nature. It has been made clear to me that the appellant does accept that he transgressed but his issue is with the manner in which his transgressions have been characterised leading to an excessively severe imposition of sanctions.

[59] He accepts that he failed to ensure the signing or written confirmation of a written agreement in breach of cl 18(c) of the 2014 code; he accepts that his refunding of the application (INZ) fee to the complainant was not prompt in breach of cl 24(c) of the 2014 code; he accepts that his request for the complainant to sign a backdated agreement was unprofessional in breach of cl 1; and he accepts that it was appropriate that he be sanctioned for that conduct and that his practice required significant improvement.

[60] He further submits that appropriate sanctions would have been restorative for the complainant and provided for the appellant's rehabilitation, to have him continue as a member of the profession, practising well.

Addressing each of the sanctions ordered in turn

[61] The Tribunal placed the appellant's conduct at the high end of the scale, called it deplorable, and I would agree, but I disagree with the appellant's counsel when he says that the Tribunal's findings of the level of misconduct of the appellant were driven by its view of illegality and dishonesty.

[62] The issue of whether cancellation of licence was appropriate in all of the circumstances is one to be looked at in the round and it is to be remembered that this was not the first occasion on which the appellant had appeared before the Tribunal on a disciplinary matter. I am told that the previous matter on which sanctions were imposed was of a similar kind, that is failing to secure a written agreement with a client.

Refund

[63] The Tribunal ordered a full refund of fees paid with no allowance for the work completed by the appellant for the complainants which must be considered in assessing a fair and reasonable refund. No challenge was made to the appellant's own assessment of the value of the work that he completed which exceeded the fee paid and the Tribunal failed to consider whether the work completed meant that in fact no refund was due.

[64] I am inclined to agree with Mr Holmes when he said that the Tribunal's approach was overly punitive in that regard because the appellant did propose to the Tribunal (and continues to submit) that a 50 percent refund of the fees paid would have been a sufficient deterrent and restorative to the complainants.

Compensation

[65] Again, it is the appellant's submission that the Tribunal was seeking to punish him rather than compensate the complainants and did so based upon the Tribunal's

errors regarding illegality and dishonesty. I will not repeat what I have said earlier as to those errors and whether they in fact founded any later views but the appellant does submit that no compensation order should have been made.

Penalty

[66] The imposition of a financial penalty is submitted by the appellant as being punitive; it is stated that he was only given a minor discount despite his acceptance of responsibility because, again, the Tribunal considered that he did not appreciate the gravity of his conduct.

[67] The penalty of $6500 I am told was more than double the penalty imposed in other cases where the Tribunal had upheld a complaint on the express grounds of dishonesty. So the submission is made that, but for those errors, no penalties would have been made and would have taken into account any other monetary orders.

[68] There was a costs award to the complainant which was calculated by reference to the costs of the Registrar and the Tribunal, though neither were sought, and to three days of District Court scale costs as the Tribunal thought that they might be.

[69] The central point that is made here, is that the appellant considers that the Tribunal does not have the jurisdiction to award costs to a complainant. I am inclined to agree looking at the statute.

[70] At paragraph 73 of its sanctions decision the Tribunal said:

> Complainants should not be out of pocket after successfully pursuing a disciplinary complaint at their own expense. A professional disciplinary process is concerned primarily with the public interest. Whether it is the Registrar's intention or not, I consider it is appropriate to consider the overall costs the Tribunal would award and allow costs the Registrar chooses not to claim to contribute to the complainants' cost.
>
> [74] I am satisfied that an award of $5780 in favour of the complainants is appropriate. I note that the award is substantially less than 50 percent of the actual costs incurred by the complainants, the Registrar and the Tribunal.

> Accordingly, the award is a modest one in the context of professional disciplinary proceedings.

[71] What the Tribunal failed to consider it would seem to me, however, with respect, is what its jurisdiction was to award costs to a complainant which I do not consider could possibly fall within the description in the Act.

[72] Section 51(g) of the Act speaks of an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution. It would be a stretch to consider the costs of the complainant to be costs or expenses of the investigation, inquiry or hearing, and I determine that it was an error of law for the Tribunal to make such a finding and then impose an order for costs in favour of the complainant of that or any amount.

[73] However, having said that, of course, the complainant in any investigation and hearing of a complaint such as that, is entitled, where the Tribunal finds the complaint proved, to be awarded compensation and the Tribunal had the power to increase the award of compensation that it made to the complainants by the sum that it imposed as costs in their favour provided of course, in the round, the totality of the sanctions imposed was not excessive.

[74] The next matter criticised by the appellant as an excessive and disproportionate sanction was the total refund that was ordered to be paid by the appellant. Mr Holmes contends that the Tribunal made no allowance for the work completed by the appellant for the complainants which must be considered in assessing a fair and reasonable refund, particularly where no challenge was made to the appellant's assessment of the value of the work completed which exceeded the fee paid.

[75] I agree with Mr Holmes: the Tribunal failed to consider whether the work completed meant that in fact no refund was due and this may, of itself, indicate that the Tribunal's approach was punitive rather than rehabilitative. The appellant proposed then and continues to submit that a 50 percent refund of the fees paid would have been a sufficient deterrent and restorative to the complainants.

[76] And, lastly, the appellant criticises both the financial penalty that was imposed and the censure and caution again saying that these were made to punish the appellant.

With regards to the financial penalty, it is said that he was only given a minor discount despite his acceptance of responsibility because the Tribunal considered he did not appreciate the gravity of his conduct. I am advised that the penalty that it imposed, $6500, was more than the double the penalty imposed in other cases where the Tribunal upheld a complaint on the express grounds of dishonesty.

[77] As to censure and caution, the appellant accepts that both were appropriate; because the caution that was made was based on incorrect findings of illegality and dishonesty, it should have been substituted with a caution which reflected the appellant's breach of professional standards of practice.

[78] My view is the sanctions decision does reveal the Tribunal appeared to have been troubled by the appellant's lack of insight into his behaviour from his responses to the complaint during the hearing process. Remember that the appellant was unrepresented in the earlier stages of the hearing of the complaint but was represented by Mr Holmes during the sanctions hearing process. It was open to the Tribunal to find at para 28 that the appellant must have known his actions were wrong.

[79] I agree with Mr Dumbleton in his submissions at para 55 that the Tribunal could reasonably deduce that by attempting to minimise his conduct the appellant had displayed a lack of understanding of the gravity of what he had done or attempted to do. He accepted responsibility but he did attempt to minimise it and that appears to me to be the real problem for the Tribunal.

[80] I also agree with Mr Dumbleton that the Tribunal carefully weighed up the appellant's actions before and after the breaches and found itself unable to accept the appellant's submissions that his misconduct was at the low end. Instead, as I have already discussed, it found a high level of fault.

[81] Where I disagree with Mr Dumbleton and indeed with Mr Davey, on behalf of the first respondent (who are the original complainants) is as to whether, in the round, the sanctions imposed were excessive or not. The first and second respondents submit that the Tribunal exercised its discretion as to sanctions in a principled way, taking account of the relevant circumstances, and there is no error in its decision; that I should be loathe to interfere in the exercise of that discretion.

[82] But where I have found that there were two errors of law, one being as to an illegal contract, although I have said that the downstream effect of this was immaterial, and another two errors of law which did have a material effect, the first being the imposition of costs in favour of the complainant and the second being an order to refund all of the fees paid without an assessment of the work done by the appellant, I believe that I am bound to reach the decision that the sanctions ordered were excessive in the circumstances and were primarily punitive in nature. The question is what I should do having reached those findings.

Appeal by rehearing

[83] This is a rehearing. I must rehear the matter on the basis of all of the material that was before the Tribunal. I agree with the Tribunal that the appellant's misconduct was at the more serious end of the scale in respect to the complaints that he faced; was probably extremely fortunate that the Tribunal did not proceed to consider dishonesty or negligence.

Conclusions

[84] I concur with the Tribunal that his conduct was deplorable but, with respect, I consider that it should not have awarded costs to the complainant, it should not have ordered that all of the fees should be refunded to the complainants, and a stiff monetary penalty as well as a cancellation of licence in the round was excessive and was punitive, as opposed, to restorative.

[85] Under s 50 of the Act the Tribunal had wide-ranging powers open to it and, on appeal, the District Court may confirm, vary or reverse the decision of the Tribunal under appeal.

[86] Taking everything into account including two errors of law that I have found which I consider to have influenced the Tribunal to impose some of the sanctions that it did, I consider that an appropriate combination of sanctions for this appellant in respect to his breaches would have been (and this is how I intend to vary the Tribunal's decision) a combination of cancellation of licence, as occurred; prevention of reapplying for any category of licence, as the Tribunal ordered; prevention of applying

for any licence except a provisional licence, as was imposed; a formal caution, as was imposed; a refund to the complainants, now first respondents, but of only half the fees paid commensurate with the offer made by the appellant given that his evidence was uncontested as to the amount of work that he had done which in fact costed out at more than the fees that he had received; compensation to the complainants of $1500; and there will be no "reimbursement", as it is called, of the complainants', first respondents', costs of $5780. Instead, I will take account of the costs of the complainants and increase the compensation award which they have been given by the Tribunal by a sum towards that figure. Their compensation will, therefore, be increased from $1500 to $5000 to take account of all of their costs. This is not a full refund of their legal costs but is a token towards it. And, in addition, given the comparative severity of all of the sanctions together that were imposed and which I am upholding, I consider that whilst the appellant should still pay a monetary penalty, $6500 was excessive under the circumstances; I impose a monetary penalty of $3000.

[87] In summary, therefore, I uphold the Tribunal's cancellation of licence with effect on the twentieth working day after delivery of the Tribunal's decision. I uphold his prevention from reapplying for any category of licence until monetary orders are discharged by him. I uphold the prevention of his application for any licence except a provisional licence until the Graduate Diploma in New Zealand Immigration Advice had been obtained by him and he has practised under a provisional licence and under approved supervision for two years after the date of the decision. I uphold the formal caution. I vary the Tribunal's decision as to the payment of a penalty: that is now to be $3000, and I order that he refund fees to the complainants (now first respondents) in the sum of $4025, not $8050. That will of course mean that there will be required to be repayment by them of some part of the refund that they have received. And I now compensate the first respondents in the sum of $5000 altogether but cancel that part of the decision granting them costs of $5780.

Conclusion

[88] The appeal is partially successful in that whilst I have upheld some of the sanctions imposed, I have varied others. I now seek submissions on costs from counsel.

[89] Whilst the appellant seeks costs because he has been partially successful, the reverse of that coin is that all parties have been partially successful and, accordingly, I consider that costs should lie where they fall. I make no order.

M-E Sharp
District Court Judge