IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA392/2018
[2019] NZCA 221

BETWEEN	PETER JAMES MORAHAN Appellant
AND	WELLINGTON STANDARDS COMMITTEE 2 Respondent

Hearing: 28 May 2019

Court: Collins, Peters and Mander JJ

Counsel: A C Beck for Appellant
D R La Hood and S K Brennan for Respondent

Judgment: 13 June 2019 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The suspension will commence on 1 July 2019.

C Costs are reserved.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] In September 2017, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) found Mr Morahan liable in relation to two disciplinary charges prosecuted by the Wellington Standards Committee (the Standards

Committee).[1] In a subsequent penalty decision, the Tribunal suspended Mr Morahan from practice for four months with effect from 4 December 2017 and ordered that he pay costs totalling $37,171.63.[2]

[2] Mr Morahan appealed both the liability and penalty decisions. That appeal, which was heard as a general appeal,[3] was dismissed by Churchman J on 29 May 2018.[4] Mr Morahan sought and was granted leave to appeal to this Court on two questions of law, which we explain at [7] to [8].[5] The Tribunal's penalty decision has been suspended pending delivery of our judgment.

[3] The first charge alleged offending by Mr Morahan between 1 August 2002 and 1 August 2008, when he was acting for Ms B, Mr J and the PGJ Trust (the Trust) in relation to a number of property transactions. Mr J was the settlor, and a trustee, of the Trust. Mr Morahan was also a trustee of the Trust. The gravamen of the first charge was that Mr Morahan breached the professional duties he owed Ms B by acting for Mr J and the Trust in a way that disadvantaged Ms B. There is an issue as to whether or not the first charge concerned events that predated 1 August 2002 and whether the Tribunal acted unlawfully by taking into account events that occurred prior to 1 August 2002, when setting the penalty imposed upon Mr Morahan.

[4] The second charge alleged Mr Morahan breached the professional duties he owed Ms B, by taking steps that were contrary to her interests in relation to events that followed the breakup of the marriage between Ms B and Mr J, and in relation to proceedings between them in the Family Court. This offending was alleged to have occurred after 1 August 2008.

[5] The dates specified in the first charge are important because of s 351 of the Lawyers and Conveyancers Act 2006 (the 2006 Act), which came into force on 1 August 2008. The 2006 Act replaced the Law Practitioners Act 1982 (the 1982 Act). The relevant parts of s 351 of the 2006 Act state:

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1 *Wellington Standards Committee 2 v Morahan* [2017] NZLCDT 24.
2 *Wellington Standards Committee 2 v Morahan* [2017] NZLCDT 34.
3 Lawyers and Conveyancers Act 2006, s 253.
4 *Morahan v Wellington Standards Committee 2* [2018] NZHC 1229.
5 *Morahan v Wellington Standards Committee 2* [2018] NZCA 407.

> **351 Complaints about conduct before commencement of section**
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> (1) If a lawyer or former lawyer … is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established … by the New Zealand Law Society.
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> (2) Despite subsection (1), no person is entitled to make under this Act—
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> …
>
> (b) a complaint in respect of—
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> (i) conduct that occurred more than 6 years before the commencement of this section.

The complaints service referred to in s 351(1) was established by s 121(1) of the 2006 Act.

[6] Section 351 of the 2006 Act creates a limitation period for disciplinary proceedings against lawyers. A complaint that is lodged after 1 August 2008 cannot concern conduct that occurred before 1 August 2002. The logical corollary of this limitation is that no disciplinary charge in relation to a complaint made after 1 August 2008 should allege offending that occurred before 1 August 2002. Ms B's complaint against Mr Morahan was made on 18 August 2013 and was therefore subject to s 351 of the 2006 Act.

[7] Mr Morahan can only appeal to this Court with leave on questions of law.[6] Churchman J declined leave.[7] This Court, however, granted Mr Morahan leave to appeal on two discrete questions of law.[8] Those questions ask:

> (a) Did the Tribunal and the High Court comply with s 351 of the 2006 Act when:
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> (i) finding Charge 1 proved and upholding that finding; and

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6 Lawyers and Conveyancers Act, s 254.
7 *Morahan v Wellington Standards Committee 2* [2018] NZHC 1583.
8 *Morahan v Wellington Standards Committee 2,* above n 5, at [1].

(ii) deciding upon and upholding the penalty?

(b) Did the High Court reach its own conclusions on the merits of the appeal? If it did not, what consequences should follow in the circumstances of this case?

[8] The first question of law engages the effect of the limitation in s 351 of the 2006 Act in relation to both findings of liability and decisions as to penalty. The second question concerns the test that should be followed by the High Court when considering a general appeal from decisions of the Tribunal. That test was explained by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*, in which the Court said that when hearing general appeals, an appellate court is required to reach its own conclusions in relation to the matters in dispute.[9] The Court also said:[10]

> … the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

Background

[9] Annexed to the charges was a statement of "particulars" comprising 56 paragraphs that set out the "facts and matters" relied upon by the Standards Committee to support the charges.

[10] The first 25 paragraphs of the particulars set out events and allegations, which predated 1 August 2002.

[11] The particulars say that in July 1998 Mr J commenced a de facto relationship with Ms B who, at the time, owned her own unencumbered home in Johnsonville and, that in February 1999 they jointly purchased a property at Rosetta Road in Raumati. Mr Morahan acted for both Mr J and Ms B in relation to the purchase of the Rosetta Road property that was purchased with the assistance of a loan of $150,000 secured against the title to Ms B's Johnsonville property. Mr Morahan acted for Ms B in arranging this loan and in registering the mortgage over her property.

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9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5].
10 At [4] (footnotes omitted).

[12] Mr J and Ms B married in April 1999. At about the same time, Ms B was appointed as an additional trustee of the Trust. In the following month Ms B and her children from a previous relationship were added as discretionary beneficiaries of the Trust.

[13] Mr Morahan acted for Ms B, Mr J and the Trust in relation to a number of transactions in the ensuing years, including the raising of a loan secured against the Rosetta Road property in June 1999, the subdivision of the Rosetta Road property in October 1999 and the transfer of ownership of the Rosetta Road property to the Trust in February 2000.

[14] In about 2002, the relationship between Ms B and Mr J became strained. Notwithstanding their difficulties, the marriage continued until July 2009. In March 2002, Ms B was removed as a trustee of the Trust. She says that she did not know that this had occurred. Mr Morahan acted for Mr J and the Trust in relation to those events.

[15] Paragraphs 26 to 51 of the particulars set out facts and allegations that postdate 1 August 2002. The narrative says that in December 2004, Ms B sold her Johnsonville property and advanced the net proceeds of sale, comprising $60,000, to the Trust to purchase a property at Golf Road, Paraparaumu. It was alleged that Ms B, at this time, was still unaware she had been removed as a trustee. Mr Morahan acted for Mr J, Ms B and the Trust in relation to the purchase of the Golf Road property.

[16] In July 2005, Mr Morahan acted for the Trust in arranging a restructuring of mortgages over the Rosetta Road property and the sale of that property. It was alleged Mr Morahan failed to ensure Ms B's interests were properly protected in relation to this transaction.

[17] Ms B and Mr J lived in the Golf Road property for a number of years. Following their separation in July 2009, Mr Morahan, acting for Mr J, and in his capacity as a trustee, executed a deed which removed Ms B and her children as beneficiaries of the Trust. In September 2009, the Trust evicted Ms B from

the Golf Road property. Mr Morahan continued to act for Mr J and the Trust during this phase of the breakdown in the relationship between Ms B and Mr J.

[18] Disputes about the separation and the division of relationship property led to Ms B commencing proceedings in the Family Court in December 2012. Mr Morahan acted as solicitor for Mr J and the Trust during the Family Court proceedings. He did so without Ms B's consent. In the Family Court proceedings Mr Morahan filed pleadings and provided evidence that it was the Trust, rather than Ms B and Mr J, that had first purchased the Rosetta Road property. It was only during a hearing in the Family Court in May 2013 that Mr Morahan produced documents that showed the Rosetta Road property had been purchased by Ms B and Mr J a year before it was transferred to the Trust. The Family Court was very critical of the way Mr Morahan conducted himself in that Court.

The charges

[19] Charge 1 alleged that between 1 August 2002 and 1 August 2008, Mr Morahan engaged in conduct that constituted "misconduct",[11] or "conduct unbecoming a barrister and solicitor",[12] or "negligence or incompetence in his professional capacity … so as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute".[13] The charge thereafter referred to the particulars annexed to the charges.

[20] There is a heading above paragraph 52 of the particulars, which states "[t]herefore the practitioner committed charge 1 referred to above as follows". Paragraph 52 of the particulars then sets out in eight subparagraphs the basis upon which it was alleged Mr Morahan was guilty of the first charge. The first two subparagraphs of paragraph 52 refer to Mr Morahan's conflicting roles in acting for Ms B, Mr J and the Trust in relation to the transfer of the Rosetta Road property to the Trust in February 2000 and the removal of Ms B as a trustee of the Trust on 1 March 2002. The balance of the subparagraphs in paragraph 52 identify the ways in which the Standards Committee alleged Mr Morahan breached his professional

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11 Law Practitioners Act 1982, s 112(1)(a).
12 Section 112(1)(b).
13 Section 112(1)(c).

obligations to Ms B in relation to the various transactions that occurred between 1 August 2002 and 1 August 2008.

[21] Charge 2 alleged that after 1 August 2008, Mr Morahan engaged in conduct that constituted "misconduct",[14] or "unsatisfactory conduct",[15] or "negligence or incompetence" of such a degree "as to reflect on his or her fitness to practise or as to bring [the] profession into disrepute".[16] The charge then referred to the particulars annexed to the charge.

[22] Paragraphs 53 to 56 explain the basis upon which it was alleged Mr Morahan was guilty of Charge 2. Those paragraphs refer to his breaches of duty when removing Ms B as a beneficiary of the Trust, evicting her from the Golf Road property and in the way he conducted himself in relation to the Family Court proceeding. Most significantly, the Standards Committee alleged "[t]he practitioner filed pleadings and gave evidence in the Family Court Proceedings that he knew, or ought to have known, were false and/or misleading …".

Tribunal decisions

[23] In reaching its decision as to liability, the Tribunal explained that its findings in relation to the first charge were confined to events that occurred between 1 August 2002 and 1 August 2008. The Tribunal said that it reminded itself "that the charge [could] be proved only on findings made in respect of conduct alleged to have occurred after 1 August 2002";[17] that it was making "no finding against [Mr Morahan] in respect to any of his conduct prior to 1 August 2002";[18] and that it found Mr Morahan "breached his professional obligations to Ms B … from at least December 2004 through to July 2005"; and that "there were other breaches as well prior to December 2004 in the period backdated to August 2002".[19]

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14 Lawyers and Conveyancers Act, s 241(a).
15 Section 241(b).
16 Section 241(c).
17 *Wellington Standards Committee 2 v Morahan*, above n 1, at [13].
18 At [43].
19 At [50].

[24] Notwithstanding that the Tribunal expressly confined its findings as to liability to matters that occurred between 1 August 2002 and 1 August 2008, the Tribunal also made findings in relation to Charge 1 of matters that predated 1 August 2002. The Tribunal explained that its findings in relation to matters that occurred before 1 August 2002 were "relevant in establishing context".[20] In particular, the Tribunal said there was a "clear failure by [Mr Morahan] to ensure that [Ms B] was independently advised in respect of [the] earlier transactions"[21] and that his actions before 1 August 2002 "fell well short of his duty to [Ms B] at that time, but more importantly, had ongoing implications for what was to follow".[22]

[25] The Tribunal concluded Mr Morahan had breached the professional duties he owed Ms B to ensure she received independent advice in relation to the transactions that occurred after 1 August 2002 and that his conduct constituted negligence or incompetence to such a degree that it reflected upon his fitness to practise or tended to bring the profession into disrepute.[23] Having made that finding, it was not necessary for the Tribunal to consider the alternative elements of Charge 1 that alleged Mr Morahan was guilty of misconduct or conduct unbecoming a Barrister and Solicitor.

[26] The focus of the Tribunal's findings in relation to Charge 2 was upon the way Mr Morahan acted for Mr J and the Trust in the Family Court proceedings and upon the way he allowed misleading pleadings and evidence to be presented in those proceedings concerning the sequence of events that led to the Rosetta Road property being acquired by the Trust. The Tribunal was satisfied Mr Morahan breached his professional duties to such a degree that he was again guilty of negligence or incompetence to such a degree that it reflected upon his fitness to practise or tended to bring the profession into disrepute.[24] Having made these findings, it was again not necessary for the Tribunal to decide if Mr Morahan's conduct constituted misconduct or unsatisfactory conduct.

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20 At [13].
21 At [44].
22 At [43].
23 At [53]–[55].
24 At [96].

[27] In its penalty decision, the Tribunal drew upon its findings concerning Mr Morahan's conduct towards Ms B before 1 August 2002. The Tribunal said that "for penalty purposes the overall course of conduct can be considered".[25]

High Court decision

[28] In his comprehensive judgment, Churchman J criticised the way the particulars of the charge were framed when he said that it was not appropriate for the allegations relating to conduct prior to 1 August 2002 to be incorporated into paragraph 52 of the particulars.[26] The Judge rejected, however, the submission that Charge 1 was invalidated by the way paragraph 52 of the particulars had been drafted.[27]

[29] After analysing the Tribunal's findings in relation to Charge 1, Churchman J said:[28]

> The Tribunal has clearly concluded that the conduct that breached the rules amounted to either negligence or incompetence in Mr Morahan's professional capacity to such a degree that it reflected on his fitness to practice, or amounted to conduct bringing the profession into disrepute had been established. That conclusion was open to it …

[30] A similar approach was taken by the Judge when examining the Tribunal's reasons in relation to Charge 2, observing that the Tribunal's conclusion that Mr Morahan's conduct was, "[a]t the very least" negligence or incompetence and that the Tribunal's findings in this regard were "consistent with" the other findings made by the Tribunal in its decision.[29]

[31] When dismissing Mr Morahan's appeal against the penalty imposed by the Tribunal, Churchman J held that the Tribunal was entitled to take into account Mr Morahan's conduct prior to 1 August 2002.[30] The Judge fully traversed all of the grounds advanced on appeal by Mr Morahan and observed that the Tribunal's finding that Mr Morahan's conduct in relation to Charge 2 was "relatively serious"

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25 At [14].
26 At [43].
27 At [48].
28 *Morahan v Wellington Standards Committee 2*, above n 4, at [123].
29 At [168]–[170].
30 At [182].

was one that "was open to it".[31] The Judge was concerned that Mr Morahan continued to display no remorse or real insight into his conduct and that, in all the circumstances, the penalties imposed were "appropriate".[32]

The first question

[32] There are two limbs to the first question posed. First, Mr Beck, counsel for Mr Morahan, submitted that the Tribunal erred in law when it made findings adverse to Mr Morahan in relation to his conduct prior to 1 August 2002, when determining Mr Morahan was guilty of Charge 1. Mr Beck submitted the High Court also erred by not determining the Tribunal's findings in relation to Charge 1 were nullified when the Tribunal considered Mr Morahan's conduct prior to 1 August 2002. Second, Mr Beck submitted that by expressly taking into account Mr Morahan's conduct prior to 1 August 2002, when determining penalties, the Tribunal breached s 351 of the 2006 Act. Mr Beck submitted that it therefore followed Churchman J also erred by upholding the Tribunal's penalty decision.

Findings in relation to liability: Charge 1

[33] In relation to the first limb of the argument we have summarised at [32], Mr Beck submitted that the Tribunal did record that it excluded Mr Morahan's conduct prior to 1 August 2002 when finding him guilty of Charge 1. He submitted that, nevertheless, the Tribunal breached s 351 by making findings against Mr Morahan in relation to events that occurred before 1 August 2002 and that those findings fatally impugned the Tribunal's findings in relation to Mr Morahan's conduct between 1 August 2002 and 1 August 2008.

[34] Mr La Hood, senior counsel for the Standards Committee, acknowledged there was an error in the way paragraph 52 of the particulars of the charge had been drafted and that it should not have been alleged Mr Morahan was guilty of Charge 1 because of conduct that predated 1 August 2002. Mr La Hood submitted, however, that the evidence concerning Mr Morahan's conduct prior to 1 August 2002 was relevant and admissible as propensity evidence. He relied upon the definition of "propensity

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31 At [216].
32 At [217].

evidence" in s 40(1)(a) of the Evidence Act 2006, which explains that propensity evidence is evidence that "tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved", but excludes evidence that forms the basis of the charge or allegations against the person concerned.

[35] We accept that propensity evidence may be adduced in disciplinary proceedings. We do not, however, believe it is necessary to explore this point further because the Tribunal did not treat Mr Morahan's conduct prior to 1 August 2002 as propensity evidence. The Tribunal made it abundantly clear that it confined its findings as to liability in relation to Charge 1 to Mr Morahan's conduct between 1 August 2002 and 1 August 2008. The findings made in relation to the events that occurred before 1 August 2008 were merely contextual. For this reason, we do not see any basis for concluding the Tribunal's findings on liability in relation to Charge 1 were rendered invalid by its contextual findings about the events that occurred before 1 August 2002. We are therefore satisfied the Tribunal and the High Court complied with s 351 of the 2006 Act when finding and confirming Mr Morahan was guilty of Charge 1.

Decision as to penalty

[36] Mr Beck was very critical of the Tribunal and Churchman J for concluding that evidence of Mr Morahan's conduct prior to 1 August 2002 was relevant when assessing penalty. Mr Beck submitted that the limitation provisions of s 351 of the 2006 Act were rendered nugatory when the Tribunal took Mr Morahan's conduct prior to 1 August 2002 into account when determining the penalties that it imposed. Mr Beck also submitted Churchman J erred in law when upholding the Tribunal's reasons for considering Mr Morahan's conduct prior to 1 August 2002 when setting penalties.

[37] In rejecting Mr Beck's submissions in the High Court, Churchman J said:[33]

> There are many relevant factors that can be considered in forming a view as to the fitness of a practitioner to practice. These can include:

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33 At [181]–[182].

(a) whether the conduct in question was a one-off event in an otherwise blameless career;

(b) whether the practitioner has insight into the consequences of his or her actions;

(c) whether the practitioner has expressed remorse or apologised for their actions;

(d) whether the conduct in question is part of a consistent pattern of behaviour extending over a long period of time (including in this case, prior to 1 August 2002); and

(e) any prior disciplinary sanctions that may have been imposed on the practitioner.

In that context, there was no reason why the Tribunal should not have had regard to the fact that the conduct in question had commenced prior to 1 August 2002.

[38] The Tribunal referred to *Daniels v Complaints Committee 2 of the Wellington District Law Society*, a decision of a Full Court of the High Court, when explaining that Mr Morahan's conduct prior to 1 August 2002 was relevant to penalty.[34] That case concerned a law practitioner who was suspended from practice for three years for engaging in a sexual relationship with a client in circumstances that constituted an abuse of the relationship of trust and confidence between Mr Daniels and his client. In that case, the Tribunal was influenced by Mr Daniels' denials and his lack of remorse. The High Court said:[35]

> A tribunal, when determining ultimate fitness to remain in practise, whether limited by suspension, or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it is the obvious absence of a mitigating factor and relevant to balancing matters of character.
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> …
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> In considering sanctions to be imposed upon an errant practitioner, a disciplinary tribunal is required to view in total the fitness of a practitioner to practise, whether in the short or long term. Criminal proceedings of course reflect badly upon the individual offender, whereas breaches of professional standards may reflect upon the wider group of the whole profession, and will arise if the public should see a sanction as inadequate to reflect the gravity of the proven conduct. The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which

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34 *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC), cited in *Wellington Standards Committee 2 v Morahan,* above n 2, at [14].

35 At [32] and [34].

> the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards.

[39] There are three points that need to be stressed about the relevance of the High Court's decision in *Daniels* to the present case. First, s 351 of the 2006 Act was not engaged in the *Daniels* case. Second, the "poor behaviour" that the High Court was referring to in *Daniels* was the lawyer's attitude towards the complainant and the charges. That case did not involve breaches of professional duty by Mr Daniels prior to the period covered by the charges he faced. Third, Mr Daniels' "poor behaviour" was held to be relevant when assessing mitigating factors; the High Court referred to this as "the obvious absence of a mitigating factor and relevant to balancing matters of character".[36] Thus, only the third point in *Daniels* is relevant to the present case.

[40] In deciding whether s 351 of the 2006 Act prohibited the Tribunal from considering in its penalty decision Mr Morahan's conduct prior to 1 August 2002, we consider it helpful to first examine the purpose that underpins penalties that are imposed by professional disciplinary bodies. Those purposes can be summarised in the following way:

(a) When deciding what penalty to impose upon a practitioner found guilty of a disciplinary charge, the Tribunal must bear in mind its responsibility to protect the public. This function has been stated on numerous occasions[37] and is reflected in the purposes of the 2006 Act.[38]

(b) The Tribunal plays an important role in maintaining public confidence in the profession through the setting of standards.[39]

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36 At [32].

37 *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492; and *Daniels v Complaints Committee 2 of the Wellington District Law Society*, above n 34, at [22].

38 Lawyers and Conveyancers Act, s 3(1)(b).

39 Section 3(1)(a); and *Bolton v Law Society*, above n 37, at 492.

(c) Penalties imposed by the Tribunal may have a rehabilitative function, in that a penalty may be designed to assist a practitioner who has been found wanting to be reintegrated into the profession.[40]

(d) It is also important to recognise that penalties imposed by the Tribunal may have a punitive function.[41] From a practitioner's perspective, any penalty imposed by the Tribunal is likely to be viewed as punitive.

[41] The polycentric nature of the Tribunal's role when determining a penalty supports the submission advanced by Mr La Hood that the Tribunal must be entitled to take into account a wide range of matters when determining what penalty is appropriate in any particular case. Those matters might include the practitioner's prior good conduct, as well as the extent to which the findings in relation to liability reflect a demonstrated ongoing pattern of professional misconduct. This approach is also consistent with s 239 of the 2006 Act, which provides the Tribunal may receive as evidence any information or matter that "may, in its opinion assist it to deal effectively with the matters before it", provided that in doing so, the Tribunal complies with the rules and principles of natural justice.[42]

[42] Ultimately, the answer to the first question posed is to be found by examining the text and purpose of s 351 of the 2006 Act.

[43] The text of s 351 of the 2006 Act supports Mr La Hood's submissions. While that section puts in place a limitation period for complaints, and by implication, disciplinary charges against a lawyer, the text of s 351 does not purport to limit in any way the matters which the Tribunal may take into account when assessing what penalty to impose.

[44] The purpose of s 351 is to limit what matters may be the subject of a complaint and charge against a practitioner. That purpose does not, however, restrict the matters

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40 *B v B* HC Auckland HC4/92, 6 April 1993; and *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [47].

41 *Taylor v General Medical Council* [1990] 2 All ER 263 (PC); and *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*, above n 40, at [46].

42 Lawyers and Conveyancers Act, s 236; and New Zealand Bill of Rights Act 1990, s 27(1).

that the Tribunal can properly take into account when determining penalties, particularly when regard is had to the wide purpose of disciplinary penalties that we have referred to at [40].

[45] We therefore conclude that the Tribunal was not in breach of s 351 of the 2006 Act, when it took into account Mr Morahan's breaches of his professional duties to Ms B prior to 1 August 2002 when determining the penalties it imposed in relation to Charge 1. The High Court also complied with s 351 of the 2006 Act when upholding this aspect of the Tribunal's decision.

The second question

[46] Mr Beck was very critical of Churchman J's analysis of the Tribunal's findings of liability in relation to both charges. In particular, Mr Beck said the findings of negligence or incompetence could not be properly addressed on appeal by the High Court Judge saying that those findings were available to the Tribunal.

[47] Having examined the detailed manner in which Churchman J dealt with the Tribunal's findings that Mr Morahan was guilty of Charges 1 and 2, we are very satisfied that the Judge did significantly more than say the Tribunal's findings were "available to it".

[48] It is noteworthy that at the commencement of his judgment, Churchman J reminded himself that the appeal was to be conducted as a rehearing.[43] This in itself reflected his obvious understanding of the requirements of *Austin, Nichols*. During the course of his judgment, Churchman J addressed the criticisms of the Tribunal's decision advanced by Mr Beck and explained why none of those criticisms justified the High Court in interfering with the Tribunal's findings. We will explain Churchman J's approach to each of the charges.

Charge 1

[49] A reading of the High Court judgment demonstrates that when confirming the finding of liability in relation to Charge 1, Churchman J:

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[43] *Morahan v Wellington Standards Committee 2*, above n 4, at [2].

(a) traversed the evidence concerning the advance of $60,000 from Ms B to the Trust in December 2004, Mr Morahan's conflicting roles in relation to the Golf Road property transactions in 2004, his role in relation to the loans taken out by the Trust up until July 2005, and the sale of the Rosetta Road property by the Trust in mid-2005;

(b) examined the evidence concerning Mr Morahan's poor to non-existent records of his advice to Ms B during the period covered by Charge 1;

(c) explained why, as a matter of law it was not necessary for the Tribunal to distinguish between "negligence" or "incompetence"; and

(d) explained that when taken as a whole the evidence justified the Tribunal's decision that Mr Morahan's conduct passed the threshold of negligence or incompetence, which reflected on his fitness to practise as a Barrister and Solicitor or was otherwise conduct that brought the profession into disrepute.

[50] Mr Beck argued that the requirements of a general appeal meant that Churchman J needed to carefully explain why Mr Morahan's conduct amounted to negligence or incompetence, which reflected on his fitness to practise or otherwise brought the profession into disrepute.

[51] Any gaps in Churchman J's reasoning process were insignificant. It is abundantly clear from his judgment that Churchman J was not satisfied that Mr Beck could identify material errors in the Tribunal's findings in relation to liability in respect of Charge 1. In addition, Churchman J examined the evidence and reached his own conclusion that the Tribunal's findings were correct.

[52] For the sake of completeness, we record that Mr Morahan's multiple failures between 1 August 2002 to 1 August 2008 to ensure Ms B was properly informed about his role when acting for Mr J and the Trust was a significant breach of the duty that Mr Morahan owed Ms B. His conduct was not that of a reasonable lawyer in his position. The seriousness and frequency of his breaches during the period covered

by Charge 1 reflected adversely on his fitness to practise and, at the very least, his conduct was of a kind that brought the profession into disrepute.

Charge 2

[53] We make similar observations in relation to the High Court Judge's analysis of the evidence when upholding the Tribunal's findings in relation to Charge 2. Churchman J examined the evidence concerning Mr Morahan's role when acting on behalf of the Trust and Mr J, following the separation of Ms B and Mr J in July 2009. The Judge also examined in detail the evidence relating to Mr Morahan's role in the Family Court proceedings when deciding that Mr Beck had failed to identify any material error in this aspect of the Tribunal's decision.

[54] Mr Beck repeated his earlier criticism that Churchman J had not properly distinguished or explained why Mr Morahan's conduct constituted negligence or incompetence to such a degree that it reflected on his fitness to practise or otherwise brought the profession into disrepute. We reject that criticism in relation to the findings in respect of Charge 2. Churchman J clearly formed his own views about the seriousness of Mr Morahan's conduct and observed that "[i]t cannot be tenably argued that a practitioner could fail to comply with a variety of rules over an extended period of time and yet not be either negligent or incompetent".[44]

[55] We would go further. Having reviewed the evidence, including the Family Court decision on costs, we are satisfied that Mr Morahan's conduct in the Family Court proceedings was a grave breach of his professional duties, not just to Ms B, but also to the Family Court. He acted in a way that fell well short of the standards expected of a lawyer in his position. His conduct was very troubling and undoubtedly brought into issue his fitness to practise as a Barrister or Solicitor. His conduct was also of a kind that brings the law profession into disrepute. That case was not borderline. It was clear cut.

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[44] *Morahan v Wellington Standards Committee*, above n 4, at [171].

Penalty decision

[56] The High Court Judge's assessment of the penalty decision of the Tribunal is beyond criticism. Churchman J examined all relevant aspects of Mr Morahan's conduct and reached the conclusion that the penalties imposed by the Tribunal were justified, particularly given the seriousness of Mr Morahan's conduct, his lack of remorse and his failure to properly appreciate the gravity of his actions.[45]

Conclusion

[57] The Tribunal and the High Court complied with s 351 of the 2006 Act when finding that Charge 1 was proven, and when determining and upholding the penalties imposed on Mr Morahan.

[58] The High Court reached its conclusions on the merits of Mr Morahan's appeal and complied with the requirements of *Austin, Nichols* in all material respects.

Result

[59] The appeal is dismissed. The Tribunal's findings on liability and penalties are upheld.

[60] Mr Morahan's suspension will commence on 1 July 2019.

[61] We reserve costs. If no agreement can be reached in relation to costs, counsel are granted leave to file by 15 July 2019 memoranda that are not to exceed three pages.

Solicitors:
Peter J Morahan, Lower Hutt for Appellant
Luke Cunningham & Clere, Wellington for Respondent

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45 At [205].