

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2016] NZLCDT 13

LCDT 029/13 and 010/15

BETWEEN

**CANTERBURY-WESTLAND
STANDARDS COMMITTEE 3**

Applicant

AND

EDWARD ORAL SULLIVAN

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Mr C Lucas

Mr G McKenzie

Mr H Matthews

HEARING at District Court, Christchurch

DATE OF HEARING 29 April 2016

DATE OF DECISION 13 May 2016

COUNSEL

Mr D La Hood for the Applicant

Mr J Parker for the Respondent

**REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY**

[1] The respondent has pleaded guilty to:

- (a) An amended notice of charge dated 4 April 2016 alleging that his actions relating to the administration of a family trust and the estates of a married couple constituted negligence or incompetence in his professional capacity and the negligence or incompetence was of such a degree as to reflect on his fitness to practise as a solicitor or as to tend to bring the profession into disrepute (LCDT 029/13).
- (b) A notice of charge dated 8 June 2015 alleging that he has been convicted of offences punishable by imprisonment that reflect on his fitness to practise as a solicitor or as to tend to bring the profession into disrepute, namely four convictions for dishonesty offences in respect of his role in the collapse of South Canterbury Finance Ltd (LCDT 010/15).

[2] The amended notice of charge is a representative charge and replaces the more serious charges which were laid under LCDT 029/13, it having been accepted that the admitted conduct did not amount to dishonesty. The Tribunal is satisfied of the appropriateness of the resolution and has accordingly granted leave to withdraw those charges.

[3] Having resolved the charges, counsel for the applicant and the respondent agreed on proposed orders that the Tribunal could consider appropriate to make.

[4] The Tribunal did not accept or agree that the proposed resolution that had been made with the respondent was something that it could accept without a hearing. It accordingly directed a hearing indicating that the proposed penalty was not necessarily acceptable to it. The Tribunal required the respondent to file an affidavit of assets and liabilities prior to the hearing.

[5] The hearing as to penalty occurred on 29 April 2016 at which the Tribunal imposed the following orders:

- (a) Suspension for three years;
- (b) Censure;
- (c) Payment of the costs of the New Zealand Law Society of \$29,590.84;
- (d) Refund to the Law Society the Tribunal's Costs, which are to be fixed.

[6] It reserved its reasons for the penalty imposed. This decision now records those reasons.

[7] Both counsel have submitted that in imposing penalty, the Tribunal should first consider what the appropriate penalty might have been in respect of each charge alone, and then determine the appropriate overall penalty. The Tribunal accepts that approach.

Level of culpability

Trust and Estate Matters

[8] Counsel for the respondent has accepted the submissions of the applicant that the respondent failed to meet his professional obligations as a trustee of the family trust and as an executor of the estates as follows:

- (a) He abrogated his role as trustee in the family trust to his co-trustee the late Alan Hubbard. He failed to meet the requirement to distribute the trust's assets before its expiry. He had no knowledge of and played no part in Mr Hubbard's decision to invest more than \$600,000 in Aorangi Securities Ltd, a company under Mr Hubbard's control.
- (b) Upon his retirement from practice he asked for a Deed of Retirement/Indemnity to be executed in circumstances where he should

have advised the signatories as to possible remedies available and of the need for independent legal advice. It is accepted by the applicant that this was the standard practice of the respondent and was not intended to be detrimental to the beneficiaries.

- (c) He abrogated his role as trustee in the estates to his co-trustee Mr Hubbard. Investments in respect of the estates were made by Mr Hubbard in Aorangi Securities Ltd and in South Canterbury Finance Ltd. The sums invested exceeded \$620,000. The respondent again had no knowledge of these actions and took no part in the decision to make the investments.
- (d) The family trust has been substantially repaid by the statutory manager and the estates have been repaid almost all of their investments.

[9] The respondent has previously been found guilty of professional misconduct. In 2009 he was found to have deliberately authorised the taking of fees contrary to specific directions from the client. He was censured, fined, ordered to pay compensation, and costs. In 2013 he was found guilty of unsatisfactory conduct for failing to comply with the rules relating to the signing of authorities for the investment of funds on behalf of clients in his former firm's nominee company. He was censured and ordered to pay costs.

[10] Counsel for the applicant has referred the Tribunal to the decisions in *Sorensen*¹, *Jones*² and *Johnston*³, where penalties included suspension, or censure. The submission was that, having regard to the penalties imposed in those matters and to the respondent's previous disciplinary record, a period of suspension, censure and costs was the appropriate penalty to impose in respect of the family trust and estate matters.

¹ *Sorensen v New Zealand Law Society* [2013] NZHC 1630.

² *Wellington Standards Committee 2 of the New Zealand Law Society v Christopher Jones* [2014] NZLCDT 52.

³ *Auckland Standard Committee 3 of the New Zealand Law Society v Edward Johnston* [2011] NZLCDT 14.

[11] Counsel for the respondent submitted that penalty ought not to amount to a period of suspension but might well incorporate a censure and costs.

[12] The Tribunal finds that the respondents abrogation of duty resulted in the risk of serious loss to the family trust and the estates which risk was averted by other interventions. He misplaced his faith in and loyalty to Mr Hubbard. The Tribunal takes into account the respondent's previous disciplinary record. It reaches the conclusion that a period of suspension, censure and costs is the appropriate penalty to impose.

The Convictions

[13] Counsel for the applicant in discussing the appropriate penalty in respect of this matter compared similar finance company cases where imprisonment was the starting point in respect of the criminal offending. He noted that in respect of those cases the disciplinary sanctions imposed were suspension or censure:

- (a) In *Davidson* [2013] NZAR 1519, the starting point for the criminal offending was 3 years and 3 months imprisonment. The disciplinary penalty was 9 months suspension.
- (b) In *Whale* [2014] NZLCDT 22, the starting point for the criminal offending was 3 years and 2 months imprisonment. The disciplinary sanction was 12 months suspension.
- (c) In *Banbrook* [2014] NZLCDT 37, the starting point for the criminal offending was 2 years and 6 months imprisonment. The disciplinary sanction was censure.

[14] The applicant submitted that, having regard to those cases, the appropriate penalty to impose would be lengthy suspension, censure and costs.

[15] Counsel for the respondent submitted that the findings of Heath J when sentencing the respondent should be relevant to the determining of penalty in this disciplinary proceeding, namely:

- (a) The respondent was not inherently dishonest and that his conduct was completely out of character;
- (b) The respondent did not intend to cause loss or emotional harm to any potential investor and that he did not believe that their money was at risk;
- (c) There was no loss to any qualifying members of the public who invested on the faith of the two prospectuses.

[16] His submission was that an analysis of the decisions referred to by counsel for the applicant leads to the conclusion that striking-off of the respondent would be an excessive penalty in all the circumstances. He did not advance any suggested penalty in lieu of a strike-off.

[17] When account is taken that Heath J adopted a starting point of 2 years imprisonment for the respondents offending and by reference to the penalties referred to in para [13] above, the Tribunal concluded that a period of suspension, censure and costs was the appropriate penalty.

Overall Penalty for both matters

[18] The Tribunal agrees with the applicant's submission that the combination of the two matters before it and the respondent's previous disciplinary record means that he is on the cusp of strike-off.

[19] The Tribunal records its considerable concern about the following matters which arose in the respondent's answers to questions from the Tribunal:

- (a) Mr Sullivan revealed that he was going into his former law firm's office one day a week.
- (b) When asked whether he accepted responsibility or was still in denial of the findings of Heath J, Mr Sullivan's response was clear that he has not

accepted that finding. At para [30] on page 12 of his sentencing notes of 12 December 2014, Heath J said:

“ You cannot, at the same time maintain a not guilty stance, yet accept findings of dishonesty. I take the view that you remain in denial. You have not truly accepted responsibility for the offending. No evidence of remorse is evident. I believe you remain in denial because you find it difficult to accept that you acted in a dishonest way”.

- (c) Mr Sullivan is continuing to have contact with some former clients as a Trustee or as an Executor. The applicant raised no objections to these roles.

[20] Mr Sullivan must realise and understand that he has been convicted of a Criminal Offence under the Crimes Act and, as a result of the Tribunal's decision, cannot continue to practice as if nothing has changed.

[21] The Tribunal has regard to:

- (a) His lengthy career;
- (b) His exemplary reputation in his community;
- (c) His age;
- (d) The fact of his retirement from practice and his written undertaking never again to apply for a practising certificate.

[22] In doing so, it has found that it is able to accept the penalty proposed by the agreement of counsel which is recorded in para [5] of this decision.

Costs

[23] The applicant sought costs totalling \$29,590.84 in reliance on the principle *‘that the burden of costs of disciplinary proceedings ought to fall on the practitioner*

found to be at fault if at all possible, rather than on his or her professional body as a whole".⁴

[24] Counsel for the respondent drew attention to the Tribunal having discretion as to costs and submitted that less than indemnity costs should be ordered against the respondent. He emphasised the substantial cost that the respondent had incurred defending the criminal proceedings against him leading to him being in a somewhat precarious financial position.

[25] The Tribunal has decided that the respondent should pay the full costs of the Law Society. It has taken into account the resulting penalty imposed where the respondent was held to be on the cusp of strike-off. He does have the prospect of earning income from his trust involvements that continue and may arise despite his ceasing to practice.

Summary of orders

1. Suspension for three years effective from 29 April 2016.
2. Censure.
3. Payment of the costs of the New Zealand Law Society of \$29,590.84.
4. Refund to the Law Society the Tribunal's Costs which are fixed at \$5,788.00.
5. There is a non-publication order in respect of the names of the Family Trust and Estates.

[26] At the end of the hearing the Tribunal censured the respondent as follows:

Mr Sullivan – You are before the Tribunal today having admitted charges relating to failures of duty in respect of a family trust and two estates.

⁴ *Canterbury District Law Society Complaints Committee No 2 v Iosefa* [2009] NZLCDT 5.

You have also admitted that you have been convicted of offences punishable by imprisonment.

You have admitted that these matters reflect on your fitness to practise as a solicitor and tend to bring the profession into disrepute before the public.

This Tribunal determines that, along with other penalties imposed, you should be censured.

You have practised as a lawyer for over 40 years. In that time you have built for yourself a reputation and clientele to be envied.

Your failures now and your wrong placement of trust in the late Mr Hubbard had the effect of seriously undermining the confidence of the public in the profession.

You abdicated your responsibilities in a seriously unprofessional way.

You are censured.

DATED at AUCKLAND this 13th day of May 2016

BJ Kendall
Chairperson