

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2016] NZLCDT 36

LCDT 021/16

**BETWEEN**

**CANTERBURY WESTLAND  
STANDARDS COMMITTEE 1**

Applicant

**AND**

**GARY HORNE**

Respondent

**CHAIR**

Judge BJ Kendall (retired)

**MEMBERS OF TRIBUNAL**

Mr W Chapman

Mr A Lamont

Mr S Maling

Mr H Matthews

**HEARING** at The Independent Hearings Panel Christchurch

**DATE** 6 December 2016

**DATE OF DECISION** 15 December 2016

**COUNSEL**

Mr J Shaw for the applicant

Mr R Raymond QC for the respondent

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

[1] On 6 December 2016, Mr Horne admitted amended charges being one charge of misconduct and two charges of unsatisfactory conduct. The amended charges are appended to this decision as Appendix 1. The Tribunal then considered penalty and imposed the following orders:

- (a) Suspension for a period of three months with effect from 1 February 2017;
- (b) Censure;
- (c) An order pursuant to s 242(g) of the Lawyers and Conveyancers Act 2006 prohibiting Mr Horne from practising on his own account until authorised by the Tribunal to do so;
- (d) Costs of \$21,771.00 in favour of the Standards Committee;
- (e) Full reimbursement by Mr Horne to the New Zealand Law Society of the Tribunal's hearing costs;
- (f) An order suppressing the name and details of any clients whose matters appear in the proceedings.

[2] This decision now records the reasons for the orders that the Tribunal has made.

***Charge One - Misconduct***

[3] This charge relates to Mr Horne's actions in respect of the proposed purchase of a home by "S" and "A". The purchase was conditional on finance, approval of the title and LIM Report, and a building inspection. S and A had engaged a broker to arrange mortgage finance. There were difficulties regarding the KiwiSaver contribution. In an attempt to assist, Mr Horne provided an undertaking to the manager of the KiwiSaver Scheme in support of A's application to access the funds in

which he said that the pre-conditions for the purchase of the property were fulfilled and that the vendor and the purchasers were unconditionally obliged to settle the transaction.

[4] The undertaking was materially false in that the agreement to purchase the property remained conditional on finance which had not then been confirmed.

[5] Mr Horne also signed and certified as a “true copy of the original and that the original had been produced and shown to me”, a copy of A’s passport and a letter confirming A’s address. The documents were submitted as part of the KiwiSaver application.

[6] Mr Horne had not seen the original of these documents.

[7] When it became apparent that the purchase was to fail, Mr Horne proposed that he should buy the property as nominee for S and A, hold it for them pending approval of the finance applications and then on-sell it to them at the original purchase price.

[8] Mr Horne communicated his proposal to the mother of S and not directly to S and A. He did not advise any one of the three persons that they should obtain independent legal advice. He did state generally the terms he had in mind about the arrangement but not in any great detail.

[9] Mr Horne admitted that his actions breached the rules relating to:

- (a) The prerequisites for certifying the truth of any matter;
- (b) Engaging in conduct that is misleading or likely to mislead;
- (c) Acting in a transaction where there is, (or is likely to be) a conflict of interest.

***Charge two – Unsatisfactory conduct***

[10] This charge relates to Mr Horne's actions in respect of conflict of interest and failure to report in respect of all trust moneys handled for a client at least every 12 months.

[11] Mr Horne advanced money to his client pursuant to a Nominee mortgage, part of which was provided by his family trust. Over a period of nearly four years, he also advanced further sums from his own personal funds and from his family trust. In doing so, he did not advise his client to obtain independent legal advice as required of him by Rules 5.4.2, 5.4.3 and 5.4.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("CCCR").

[12] In addition he did not provide his client with reporting statements as required by regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

***Charge three – Unsatisfactory conduct***

[13] On 7 August 2015 two investigators were appointed under s 144 of the Act to investigate Mr Horne's management of his Nominee Company.

[14] The investigation revealed a number of shortcomings in his management including the following breaches:

- (a) The expiry of a number of mortgages without the principal sums having been repaid. In breach of rule 13 of the NCR, Mr Horne failed to:
  - (i) Provide written notice to the investors as required by the rules;
  - (ii) Collect penalty or default interest; or
  - (iii) Take any other steps to address the defaults.
- (b) In breach of rule 7 of the NCR, a number of the Nominee mortgages administered by Mr Horne had been authorised by a form that did not

correspond with the form prescribed by the Nominee Companies Rules. There was no information about the points of difference and also involved material information being omitted from the forms used by Mr Horne;

- (c) In breach of rule 8 of the NCR, Mr Horne had failed to provide information to investors about the basis on which lawyer's fees will be charged and any additional sums payable.

[15] Having admitted the Charges, counsel for Mr Horne and for the Committee reached agreement about penalty. They proposed the orders which are set out in paragraph [1] above, with the exception that the proposed period of suspension was to be for six months.

[16] The Tribunal has been referred to comparable penalty decisions in *Nelson Standards Committee v Dallison*,<sup>1</sup> and *Auckland Standards Committee (2) v Parshotam*<sup>2</sup>

[17] The Tribunal has been reminded of the purposes of the disciplinary regime as highlighted in the frequently quoted passages from *Bolton v Law Society*<sup>3</sup> and *Daniels v Complaints Committee 2 of the Wellington District Law Society*<sup>4</sup>.

[18] The Tribunal, having considered the submissions of counsel for the Committee and Mr Horne, was able to satisfy itself that the penalty orders as proposed were appropriate with the exception that it took the view that the period of suspension should be for the lesser period of three months.

[19] In coming to that decision, the Tribunal took into account the following mitigating factors;

- (a) There was no personal gain to Mr Horne in any of his actions;

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<sup>1</sup> *Nelson Standards Committee v Dallison* [2011] NZLCDT 40.

<sup>2</sup> *Auckland Standards Committee (2) v Parshotam* [2016] NZLCDT 33.

<sup>3</sup> *Bolton v Law Society* [1994] 2 ALL ER 486.

<sup>4</sup> *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850 at 856.

- (b) Mr Horne is fundamentally an honest person;
- (c) He is motivated by what has been described as his altruism attested to by the testimonials of his former clients;
- (d) His long career of service in which he has clearly put his clients first and at times to his own detriment;
- (e) That there is no risk to the public, given that he has surrendered his practising certificate, sold his practice, and will retire on 1 February 2017 after working to complete the transfer of his clients to the new practice.

[20] Having made the orders set out in paragraph [1], the Tribunal then censured Mr Horne:

“To your credit you have admitted the amended charges filed against you. The significant factor in these charges that has occurred is the conflict of interest evidence particularly in both the “P” and the “M” transactions. Conflict of Interest is at the heart of confidence in the profession and lawyers interactions with their clients and the public. The Tribunal recognises that your failure in this regard was not dishonesty for personal gain but rather missteps in your desire to assist your clients. Nevertheless it is appropriate that you are censured accordingly”.

[21] Summary of orders:

- (a) Suspension for a period of three months with effect from 1 February 2017;
- (b) Censure;
- (c) An order pursuant to s 242(g) of the Lawyers and Conveyancers Act 2006 prohibiting Mr Horne from practising on his own account until authorised by the Tribunal to do so;

- (d) Costs of \$21,771.00 in favour of the Standards Committee;
- (e) Full reimbursement by Mr Horne to the New Zealand Law Society of the Tribunal's hearing costs. These costs are now certified in the sum of \$4,020.00;
- (f) An order suppressing the name and details of any clients whose matters appear in the proceedings.

**DATED** at AUCKLAND this 15<sup>th</sup> day of December 2016

BJ Kendall  
Chairperson

## Charges

### **CHARGE ONE – P complaint**

The Canterbury Westland Standards Committee (No 1) charges Gary Horne with misconduct pursuant to section 241(a) and sections 7(1)(a)(i) and (ii) of the Lawyers and Conveyancers Act 2006 (**the Act**).

The particulars of the charge are that:

#### **Background**

1. Mr Horne was, at all relevant times, a barrister and solicitor practising on his own account.
2. In May 2015 Mr Horne was instructed by S P (**S**) and A G (**A**) to act for them in the purchase of a residential property in T (**the T property**). M P (**M**), S's mother, was the primary point of contact with Mr Horne.
3. S and A had signed an agreement dated 24 May to purchase the T property. The agreement was conditional on finance, approval of the title and LIM report, and a building inspection.
4. Confirmation was required by 22 June for the agreement to become unconditional. The settlement date for the purchase was 26 June.
5. In an initial letter dated 26 May Mr Horne asked S and A to "keep me posted with progress with your finance and it [sic] me know where you are seeking your finance". Mr Horne was advised by email the same day that finance was being obtained through a mortgage broker.
6. On 10 June Mr Horne was advised by the broker of issues relating to confirmation of finance, including difficulties regarding a KiwiSaver contribution. The broker suggested that extensions should be sought in relation to both the confirmation and settlement dates.
7. Prior to 10 June Mr Horne did not assist with or oversee finance arrangements on behalf of S and A and was not instructed by them to do so. Other than the email exchange of 26 May, Mr Horne had not sought or received instructions as to the source of finance, including as to whether any KiwiSaver contribution was involved.
8. Following contact from the broker on 10 June, Mr Horne attempted to assist S and A in confirming finance arrangements.

#### **Providing a false undertaking**

9. On 19 June Mr Horne provided an undertaking to the manager of the Westpac KiwiSaver Scheme in support of A's application to access KiwiSaver funds for use in purchasing the T property. The undertaking included a statement that:

"As at the date of the letter any conditions to the Agreement [for purchase of the T property] are fulfilled or waived and the Vendor and the Purchaser are unconditionally obliged to settle".

10. The undertaking was materially false in that the agreement to purchase the T property remained conditional on finance and had not yet been confirmed as at 19 June.



11. In providing a false undertaking Mr Horne was in breach of:
  - (a) Rule 2.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**the CCCR**) relating to the prerequisites for certifying the truth of any matter; and
  - (b) Rule 11.1 of the CCCR relating to the requirement not to engage in conduct that is misleading or likely to mislead.
12. Mr Horne acted wilfully or recklessly in breach of the requirements noted at paragraph 11.

#### **Certifying unseen documents**

13. The written KiwiSaver application submitted to Westpac included:
  - (a) A certified copy of A's passport; and
  - (b) A certified copy of a letter confirming A's address.
14. Mr Horne had signed and certified each document as "a true copy of the original and that the original has been produced and shown to me".
15. Mr Horne had not seen the original of either document prior to certifying the copies.
16. In certifying unseen documents Mr Horne was in breach of:
  - (a) Rule 2.5 of the CCCR relating to the prerequisites for certifying the truth of any matter;
  - (b) Rule 11.1 of the CCCR relating to the requirement not to engage in conduct that is misleading or likely to mislead.
17. Mr Horne acted wilfully or recklessly in breach of the requirements noted at paragraph 16.

#### **Conflict of interest – purchasing the T property as nominee**

18. Mr Horne obtained from the vendor a one day extension of the confirmation date to 23 June. By 23 June the KiwiSaver application had not progressed to the point that S and A were able to confirm finance.
19. A further request by Mr Horne for an extension of the confirmation date (made on the morning of 23 June) was declined by the vendor. The vendor, through their solicitor, stated that there would be no agreement if confirmation were not provided by 4pm that day.
20. Mr Horne then contacted M by phone and stated that he could purchase the T property as nominee for S and A, hold it for them pending approval of the KiwiSaver application, then on-sell it to them at the original purchase price. Mr Horne advised that he would require payment of interest equivalent to the amount S and A would have been paying to their funding bank.
21. M approved the proposal in her phone discussion with Mr Horne.
22. In making this proposal, Mr Horne:
  - (a) Did not consult with S or A directly;
  - (b) Did not at any point advise S, A or M that they should obtain independent legal advice;

or

- (c) Did not detail any additional terms relating to the proposed arrangement prior to confirming the agreement to purchase with the vendor (eg as to a deposit, holding costs other than interest, whether the agreement was conditional on finance being approved, any confirmation or settlement dates, any obligations owed to Mr Horne if the proposed on-sale was not completed).
23. After speaking with M, Mr Horne confirmed the agreement to purchase the T property with the vendor, noting that he would be the nominated purchaser. He also confirmed that settlement would proceed on 26 June.
24. Mr Horne had further contact with M, S and A by email on 23 June. He stated that he had confirmed the agreement to purchase the T property and outlined certain of the terms on which he proposed to on-sell the property to S and A. This included a requirement that a deposit of \$24,750 be paid to him.
25. On 25 June S, A and M sought independent legal advice, instructing Janice Williams of Heartland Law.
26. Between 25 and 30 June Mr Horne and Ms Williams exchanged correspondence regarding the terms of the proposed sale of the T property to S and A. Terms for sale were not able to be agreed.
27. Mr Horne subsequently on-sold the T property to another purchaser.
28. In entering into the arrangement detailed above, Mr Horne was in breach of:
- (a) Rule 5.4.2 of the CCCR which prohibits a lawyer from acting for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects;
  - (b) Rule 5.4.3 of the CCCR which prohibits a lawyer from entering into any financial, business or property transaction with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised; and
  - (c) Rule 5.4.4 of the CCCR which requires a lawyer who enters into a financial, business or property transaction with a client to advise the client of the right to receive independent advice in respect of the matter.
29. Mr Horne acted wilfully or recklessly in breach of the requirements noted at paragraph 28.

### **CHARGE TWO – M complaint**

The Canterbury Westland Standards Committee (No 1) further charges Gary Horne of Christchurch with unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, pursuant to section 241(b) and sections 12(a), (b) and (c) of the Act.

The particulars of the charge are that:

#### **Background**

30. Mr Horne was, at all relevant times, a barrister and solicitor practising on his own account.
31. Mr Horne operated a lawyers nominee company known as the G.D. Horne Solicitors Nominee Company Limited (**the Nominee Company**).
32. On 22 December 2010 A M (**Ms M**) and H H (**Mr H**) engaged Mr Horne in relation to:

- (a) The purchase of a property in W (**the W property**); and
  - (b) A nominee mortgage in respect of the W property, administered through the Nominee Company (**the Nominee Mortgage**).
33. Ms M was the purchaser of the W property and became the sole owner. Mr H was involved as a developer. Ms M and Mr H intended to demolish a building on the site of the W property, sub-divide it, and then build flats on the land.
34. In respect of the Nominee Mortgage, Ms M was the borrower and Mr H was the covenantor.

#### **Conflict of interest – use of his own funds**

35. On 23 December an advance of \$50,000 was paid by Mr Horne to Ms M pursuant to the Nominee Mortgage. Part of the \$50,000 advance was provided by Kotuku Trust (Mr Horne's family trust).
36. Ms M and Mr H were short of funds to settle the purchase of the W property. On 23 December Mr Horne paid a further advance of \$20,000 to Mr H to assist with settling the purchase. Mr Horne made the \$20,000 payment from his own personal funds.
37. Between December 2010 and August 2014 Mr Horne advanced further funds totalling \$364,280 to Mr H to continue work on developing the W property. The further advances were paid by Mr Horne from his own personal funds and from Kotuku Trust.
38. Mr Horne made the payments detailed at paragraphs 36-37 above to Mr H at his request. In making these payments Mr Horne did not consult directly with Ms M or obtain her agreement.
39. Throughout the relevant period (up until August 2014) Mr Horne continued to act for Ms M and Mr H in administering the Nominee Mortgage. Mr Horne did not at any point advise Ms M or Mr H to obtain independent legal advice.
40. In entering into the arrangement detailed above, Mr Horne was in breach of:
- (a) Rule 5.4.2 of the CCCR which prohibits a lawyer from acting for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects;
  - (b) Rule 5.4.3 of the CCCR which prohibits a lawyer from entering into any financial, business or property transaction with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised; and
  - (c) Rule 5.4.4 of the CCCR which requires a lawyer who enters into a financial, business or property transaction with a client to advise the client of the right to receive independent advice in respect of the matter.

#### **Failure to complete reporting statements**

41. The Nominee Mortgage was administered through Mr Horne's trust account.
42. Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 requires that regular reporting statements be provided to each client in respect of all trust money handled for the client at least every 12 months.
43. Mr Horne did not send any such reporting statements to Ms M.

### CHARGE THREE – Nominee Company management

The Canterbury Westland Standards Committee (No 1) further charges Gary Horne of Christchurch with unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, pursuant to section 241(b) and sections 12(a), (b) and (c) of the Act.

The particulars of the charge are that:

#### Background

44. Mr Horne was, at all relevant times, a barrister and solicitor practising on his own account.
45. Mr Horne operated a lawyers nominee company known as the G.D. Horne Solicitors Nominee Company Limited (**the Nominee Company**).
46. On 7 August 2015 two investigators were appointed under s 144 of the Act to, inter alia, investigate Mr Horne's management of the Nominee Company.
47. The investigation revealed a number of shortcomings in Mr Horne's management of the Nominee Company, including the breaches detailed further below.

#### Breach of rule 13 of the NCR – expired loans

48. As at August 2015, five of the twenty one nominee mortgages administered by the Nominee Company had expired without the principal sum having been repaid, specifically:

Mortgagor	Amount	Expired
Client A	\$250,000	17 March 2015
Client B	\$375,000	31 May 2015
Client C	\$178,000	12 November 2014
Client D	\$420,000	23 January 2015
Client E	\$200,000	1 March 2015

49. The expiry of these mortgages without the principal sum being repaid triggered rule 13 of the NCR, thus requiring that Mr Horne, as soon as reasonably practicable after a default of 30 days:
  - (a) Provide written notice to the investors of the default and the steps being taken (or proposed to be taken) in respect of it; and
  - (b) Request that each investor advise if they do not agree with the action or proposed action specified.
50. In respect of each of the above expired mortgages Mr Horne had not, as at August 2015:
  - (a) Provided written notice to the investors as required by rule 13 of the NCR;
  - (b) Collected penalty or default interest; or
  - (c) Taken any other steps to address the default.

**Breach of rule 7 of the NCR – failure to obtain prescribed specific authority**

51. Rule 7 of the NCR provides that a responsible lawyer "must not permit an investment to be made in the name of a lawyers nominee company by an investor unless the investment is made in accordance with a specific authority". A "specific authority" is defined as an authority in the prescribed form "without amendment except as provided for in the form".
52. As at August 2015, a number of the nominee mortgages administered by Mr Horne had been authorised by a form that did not correspond with the prescribed form. The points of difference were not provided for in the prescribed form and involved material information being omitted from the forms used by Mr Horne.
53. The specific authority did not comply with the prescribed form in the following instances:

<b>Mortgagor</b>	<b>Mortgagee</b>	<b>Date of specific authority</b>
Client F	AB	26 June 2015
Client G	AB	16 December 2014
Client H	AB	7 August 2014
Client I	BC	18 March 2014
Client H	CD	7 August 2015

**Breach of rule 8 of the NCR – failure to provide required information to investors**

54. Rule 8 of the NCR requires a lawyer to provide specified information to investors before any investment is made in accordance with a specific authority. The specified information required includes:
- (a) Information about the basis on which the lawyer's fee will be charged and any additional sums payable (Schedule 4(13)).
  - (b) A valuation report which meets the temporal requirements outlined in Schedule 4(8).

As at August 2015, a number of the nominee mortgages administered by Mr Horne had been authorised without the information required by Schedule 4(13) being provided to investors (specifically, those loans referred to at paragraph 53 above).