

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2016] NZLCDT 33

LCDT 012/16

UNDER

the Lawyers and Conveyancers
Act 2006

BETWEEN

**WELLINGTON STANDARDS
COMMITTEE 2**

Applicant

AND

**RICHARD GEOFFREY WARREN
AUSTIN**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Bishop

Mr W Chapman

Mr M Gough

Mr A Marshall

HEARING at Wellington Tribunals

DATE OF HEARING 3 November 2016

DATE OF DECISION 24 November 2016

COUNSEL

Mr G Burston and Ms A Garrick for the Standards Committee

Mr P Chisnall for the Practitioner

REASONS OF THE TRIBUNAL FOR DECISION ON PENALTY

Introduction

[1] The practitioner had indicated a plea of guilty to a charge of negligence or incompetence such as to bring the profession into disrepute and both counsel had discussed and negotiated a proposed penalty which was put before the Tribunal. Having considered the considerable background material on this matter and the very unusual context of the error concerned, the Tribunal indicated to the parties, in advance, that it considered that only a level of unsatisfactory conduct had been reached.

[2] In the past the Tribunal have declined to adopt agreed penalty and plea arrangements, where we have considered the seriousness of the matter was not being accorded sufficient weight or, in other words, a proportionate consequence. Thus, as a matter of principle, where we considered the reverse was occurring, we felt obliged to intervene and suggest a lesser charge.

[3] Accordingly at the penalty hearing on 3 November, counsel for the Standards Committee sought leave to amend the charge, which is annexed as Appendix I to this decision, to one of unsatisfactory conduct and to withdraw the earlier proposed alternatives of misconduct and negligence. Leave was granted accordingly and following submissions on penalty the Tribunal imposed the following orders:

1. A censure was given to the practitioner, the form of which is attached as Appendix 2 to this decision.
2. A fine of \$3,000 was imposed.
3. An order for costs of the Standards Committee in the sum of \$11,086, pursuant to s 249.
4. An order was made pursuant to s 257 against the New Zealand Law Society for reimbursement of the Tribunal costs. These are certified in the sum of \$2,694.

5. A further order was made pursuant to s 249 that the practitioner reimburse to the New Zealand Law Society the full s 257 costs.

[4] The background to this matter is set out in the particulars in support of the charge.¹ The further relevant background is that Mr Austin has been in practice since 1980 with no previous disciplinary history. He practices in a provincial area in general practice with a large client base and a number of staff members under his supervision. His support staff receive regular in-house training and mentoring, and he acknowledges that he is reliant on their competence.

[5] At the time the conduct under consideration occurred, there was, unfortunately, some significant tension within the partnership, which has subsequently resolved following the departure of one of the partners. Mr Austin has the full support of the remaining partners.

[6] When a routine audit by LINZ (Land Information New Zealand), disclosed a missing declaration, Mr Austin relied on the assurance of his experienced legal executive Ms Y that the declaration had definitely been executed but must have been lost from the file. Thus, he instructed a duplicate or replica to be produced, which was sent to the client for signature and subsequently (not in their presence) witnessed and the declaration taken on its return. As acknowledged by Mr Austin, this was quite the wrong way to handle the situation.

[7] The second mis-step was that the practitioner then certified this document as correct to LINZ. The sequence of events was described in an opinion given by experienced lawyer Mr J O'Regan, whose analysis of the practitioner's actions we accept in full.

[8] It was only after dispatching the "replacement" declaration to LINZ, that Mr Austin began to worry that perhaps his legal executive had been mistaken and that the document might not have been previously executed and witnessed. In other words he feared that this might not have simply been a duplicate. He made a file note to this effect. It is also the case that the partnership as a whole endorsed the resubmission of the documents to LINZ.

¹ Appendix I to this Decision.

[9] Although the Standards Committee submitted that the purposes of the LINZ audit were defeated because the auditor was not told about the error, we are assured by counsel for the practitioner that a properly executed document has been provided and a full explanation given to LINZ.

[10] It is significant that the error involved was not one which could have affected the integrity of the land registration process. This is because it was a declaration of death. The practitioner had known the deceased, was personally aware of his death, he had a death certificate. There was no possible dispute as to the truthfulness of the declaration therefore. This was not a situation where the witnessing of a document, in the absence of presence of the client did, or could have, enabled any form of fraud to have been perpetrated and is to be firmly distinguished from that situation. That, and the contextual matters concerning the practitioner's actions, in that he thought he was simply replacing a properly executed document, together with the circumstances of the making of the complaint, are what drew us to the view that a breach simpliciter of the Rules and Regulations surrounding the execution of documents had occurred, rather than negligence to the stated extent.

[11] Another significant feature is that at the point when the practitioner himself began to doubt the correctness of the advice that had been provided to him by his legal executive, he notified his partners rather than attempting to conceal the matter in any way.

[12] Moving to consider the process of assessing penalty, we begin with an assessment of the seriousness of the offending, take account of aggravating and mitigating features and then assess a proportionate response in relation to other decisions of a similar nature which have been considered by the Tribunal.

Aggravating Features

[13] There are no aggravating features in relation to this conduct.

Mitigating Features

[14] There are a number of mitigating features to be taken account of by the Tribunal:

1. *Lack of disciplinary history*

[15] This practitioner has had a very long (35 years) career and has had no previous disciplinary history.

2. *References*

[16] The practitioner has provided to us a number of glowing references. While that in itself is not particularly unusual in cases of this kind, we record that the seniority of the practitioners providing references is notable, as is the consistent theme of a high standard of professionalism, integrity and client care attributed to Mr Austin. We also note the considerable community contribution made by him on a *pro bono* basis.

[17] The Tribunal has often noted that, in the context of a regime guided by the requirement for protection of the public, references in particular relating to personal circumstances cannot carry as much weight as in other circumstances. In this case, we do not consider there is or was any risk to the public, other than in relation to the maintenance of professional standards below which the practitioner fell on this particular occasion. Thus we do give weight to the references provided.

3. *Remorse and Cooperation*

[18] It is accepted by the Standards Committee that the practitioner has fully cooperated in relation to various charges brought. Indeed he had been prepared to plead to a more serious charge of negligence at one point, which may well have been because of the level of remorse and embarrassment that he had experienced as a result of his error.

[19] Having had the Tribunal's indication that the lesser charge of unsatisfactory conduct was proper, the practitioner did not in any way seek to back away from the penalty regime which had been agreed when he was facing a more serious charge.

Similar Cases

[20] The Standards Committee referred us to the Tribunal's decision in *Khan*.²

[21] As accepted by the Standards Committee *Khan* was a more serious matter in that there was a finding of negligence against that practitioner. Furthermore there was a loss suffered as a result of the negligence in that case. The practitioner did not have the benefit of the mitigating circumstances in the present case, that is a clean disciplinary history. Mr Khan had had three previous disciplinary findings against him and thus was suspended for three months.

[22] We do consider this to be a much less serious error and not one, which a member of the public, fully informed of the circumstances, would regard as damaging to the reputation of the profession. In all of these circumstances, and having regard to the very strong mitigating features able to be relied on by Mr Austin, we imposed the penalties set out at the commencement of this decision.

DATED at AUCKLAND this 24th day of November 2016

Judge D F Clarkson
Chair

² *Auckland Standards Committee 5 v Khan* [2014] NZLCDT 15.

CHARGE

Wellington Standards Committee 2 (**Committee**) charges Richard Geoffrey Warren Austin (**Practitioner**), with unsatisfactory conduct, in that at a time when the Practitioner was providing regulated legal services, his conduct:

- (a) fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer;³ and
- (b) would be regarded by lawyers of good standing as being unacceptable;⁴ and
- (c) contravened rules 2.5 and 2.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the **Rules**).⁵

The particulars of the charge are as follows:

1. At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practicing certificate.
2. At all material times the Practitioner was a partner in the Whanganui firm Treadwell Gordon.
3. Treadwell Gordon has for many years acted for a client family (the “P Family”), including D, E, A and J of the P Family.
4. In 2014, A died.
5. Treadwell Gordon was instructed to act in relation to a complex administration of A’s estate. The Practitioner became closely involved with the matter.
6. Administration of the estate required transmissions of land to new trustees (**the Transaction**).
7. The Transaction required preparation of Statutory Declarations for Transmission by Survivorship (**Declarations**) by both J and D.
8. Ms Y, a legal executive, assisted the Practitioner in preparing the documents required for the Transaction.
9. On 3 November 2014, the Practitioner certified e-dealing 9766819 (**the e-dealing**) for the Transaction.

³ Lawyers and Conveyancers Act, ss 241(b) and 12(a).

⁴ Lawyers and Conveyancers Act, ss 241(b) and 12(b).

⁵ Lawyers and Conveyancers Act, ss 241(b) and 12(c).

10. The Practitioner relevantly certified that:
 - (a) any statutory provisions specified by the Registrar for this class of instrument had been complied with or did not apply; and
 - (b) he held evidence showing the truth of the certifications he had given and would retain that evidence for the prescribed period.
11. Before certifying the e-dealing, the Practitioner reviewed the “Change of Trustee *e-dealing* workflow checklist” used by his firm.
12. This checklist did not refer to the requirement to have Statutory Declarations for Transmission by Survivorship.
13. On 13 February 2015, Treadwell Gordon was notified by Land Information New Zealand (**LINZ**) that the firm would undergo a follow-up review of its e-dealing systems and controls.
14. One of the files to be reviewed was the e-dealing.
15. When Ms Y prepared the requisite file for the LINZ review on 24 February 2015, the Declarations were not present on the file.
16. On 24 February 2015, Ms Y advised the Practitioner that she could not find the Declarations on the client’s file.
17. Ms Y showed the Practitioner an unsigned copy of the declaration form. She assured him she recalled the Declarations had been signed. He considered it looked familiar to him.
18. The Practitioner asked Ms Y to send the declaration form to J and D to sign and return scanned copies, which they did.
19. The Practitioner was not present when J and D signed the new Declarations (**new Declarations**).
20. The Practitioner signed the new Declarations as the “witness”, certifying that J and D had signed the documents in his presence.
21. The Practitioner instructed another legal executive, to date the new Declarations with the dates on which J and D had signed the Authority and Instruction forms for the Transaction.
22. The new Declarations were accordingly dated 4 August 2014 (J) and 26 September 2014 (D).
23. On 27 February 2015, before 11.35 am, the Practitioner submitted the P file, including the new Declarations, to LINZ.

24. The LINZ audit questionnaire required the Practitioner to “provide copies of the documentation supporting the certifications you have given for each instrument” in the e-dealing.
25. The Practitioner certified that the information supplied in response to the LINZ audit questionnaire was true and correct.
26. The Practitioner breached r 2.5 of the Rules by falsely certifying that:
 - (a) he had witnessed J and D’s signatures on the new Declarations;
 - (b) J had signed the new Declaration on 4 August 2014;
 - (c) D had signed the new Declaration on 26 September 2014; and
 - (d) in the LINZ audit questionnaire, the new Declarations were the documentation supporting the truth of his earlier certification of the e-dealing.
27. After completing the LINZ audit, the Practitioner made further enquiries with Ms Y about the Declarations.
28. As a result, the Practitioner became aware that the declaration form had not been saved from the precedent form to the P file at the time of the e-dealing.
29. It became apparent to the Practitioner that it was possible the Declarations were not prepared and/or signed at the time of the e-dealing.
30. On 17 March 2015 and 22 March 2015, fresh Declarations by J and D (respectively) were properly signed and witnessed by the Practitioner.
31. The Practitioner has not at any stage informed LINZ that:
 - (a) the Declarations either were not in his possession when the e-dealing was certified or were not retained on the client file; or
 - (b) the new Declarations sent with the audit were backdated and not properly witnessed.
32. In failing to inform LINZ of the above matters, the Practitioner has breached r 2.6 of the Rules.

Censure

Mr Austin, as this Tribunal has said more than once, lawyers enjoy certain privileges that non lawyers do not. As a lawyer with a Digital Certificate enabling you to access and alter the electronic register of land title in New Zealand you enjoy a very great privilege. With every privilege comes a responsibility that needs to be exercised properly and competently using your training, knowledge and experience as a lawyer. It is not good enough to abdicate that responsibility to staff members, no matter how experienced and qualified themselves, or worse still to abdicate that responsibility to compliance with a tick box check list without properly applying your mind and training to what you are actually doing. Wrongful access and change to the electronic register can have serious adverse consequences for the integrity of the register to the detriment of the whole of New Zealand. The submission of your counsel that your actions did not compromise the register is irrelevant to the general principle that you are not entitled to alter the register except in accordance with the law.

Your actions in witnessing signatures on documents you did not see signed and taking statutory declarations in absentia is behaviour that is unacceptable and that has been the subject of adverse findings from both this Tribunal and the Law Practitioners Disciplinary Tribunal in the past. Again you have failed to exercise the responsibility that comes with the privilege of being a lawyer. We recognise that no harm could actually have come from an error of this sort and that you have done everything necessary to set it right.

Mr Austin, you are Censured by this Tribunal as a mark of disapproval on behalf of the profession and the public.