

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 6
LCDT 012/19 and 024/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

AND

PATRICK JAMES KENNELLY

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr G McKenzie

Ms N McMahon

Prof D Scott

Ms S Stuart

DATE OF HEARING 19 December 2019

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 11 February 2020

COUNSEL

Mr P Davey for the applicant

Mr D Neutze for the respondent

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

Introduction

[1] The applicant filed a charge against Mr Kennelly under s 241 of the Lawyers and Conveyancers Act 2006 (the Act) which was framed as misconduct consisting of a wilful or reckless contravention of rule 10.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Conduct and Client Care Rules). He was also charged in the alternative with negligence or incompetence in his professional capacity, or with unsatisfactory conduct arising out of the alleged breach of rule 10.3. (LCDT 012/19).

[2] The particulars of the charge are that Mr Kennelly breached an undertaking he gave to the Tribunal that he would commit to moving to Affinity or other approved trust account software by 31 March 2018 and in doing so would undertake training offered by LexisNexis or other software provider. That undertaking is recorded in *Auckland Standards Committee No. 2 v Kennelly* [2017] NZLCDT 37 at [18](c).

[3] Mr Kennelly has admitted the facts of the charge but says that his conduct is unsatisfactory.

[4] The applicant filed a further charge against Mr Kennelly under s 241 of the Act alleging misconduct in respect of conduct occurring at a time when he was providing regulated services and consisting of conduct that was a wilful or reckless contravention of: (LCDT 024/19).

- (a) Regs 9(2), 12(7) and 14 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (Trust Account Regulations); and/or
- (b) Rule 3 of the Conduct and Client Care Rules.

[5] He was also charged in the alternative with negligence or incompetence in his professional capacity or with unsatisfactory conduct consisting of contraventions of the abovementioned rules.

[6] Particulars of the further charge under s 241 of the Act are attached as Appendix 1 (LCDT 024/19).

[7] In summary it is alleged that Mr Kennelly breached the Trust Account Regulations by:

- (a) Deducting fees on two occasions without sending an invoice.
- (b) Failing to report to clients about funds held on trust and/or on IBD.
- (c) Failing to reconcile the IBD account.

[8] The breach of the Conduct and Client Care Rules is alleged to have occurred by reason of Mr Kennelly's failure to pay to his clients' money held dormant for more than 12 months in his trust account.

[9] Mr Kennelly has admitted the particulars of this charge but says that his conduct was unsatisfactory.

Breach of undertaking

[10] Mr Kennelly gave an undertaking to this Tribunal at a hearing on 30 November 2017 that he would transfer his trust accounting software to Affinity or such other approved trust accounting software by 31 March 2018. He did not do so.

[11] Mr Kennelly gave the undertaking on the basis that he had issues with his then trust account software (PC Law).

[12] Mr Kennelly said that, with the assistance of Leanne Schmidt, he had been able to correct the errors in his trust account ledgers. He said that he gained an understanding of that system and was then able to produce reports without errors. He described several "Eureka" moments in the process.

[13] Having resolved the problems with PC Law, Mr Kennelly decided that it was not necessary to change to Affinity thus avoiding the cost of doing so. He has been supported in that decision by Mark Anderson, an independent trust account consultant who Mr Kennelly engaged to assist him with the transfer to Affinity software. Mr Anderson's evidence was that there was no compelling reason to make the change as the PC Law software was working satisfactorily.

[14] Having made that decision, Mr Kennelly needed to apply to the Tribunal to be released from his undertaking. The Law Society advised him to do so in July 2018. He did not respond to that advice. In September 2018, Mr Kennelly asked the Committee to give him time to resolve the issue with the Tribunal. By December 2018, not having heard further from Mr Kennelly, the Committee decided to refer the matter to the Tribunal.

[15] Mr Kennelly admitted to the Tribunal at the hearing on 19 December 2019 that he "should have come back to the Tribunal". He simply said that he did not come back. He said that, having assumed that the Committee was going to refer the matter back to the Tribunal, he resigned himself to that fact.

Discussion

[16] Mr Neutze submitted that Mr Kennelly's breach of the undertaking should result in a finding of unsatisfactory conduct. He advanced the following reasons:

- (a) Mr Kennelly had substantially complied with the undertakings given to the Tribunal.
- (b) His breach has not damaged or harmed third parties.
- (c) He had taken significant and acknowledged steps to improve the operation of his trust account which have been acknowledged by the Committee.
- (d) That the Committee does not now oppose his release from the undertaking.

- (e) That he did not seek to conceal his failure citing that it had become a mental block for him to deal with.

[17] The Committee's submission is that Mr Kennelly's breach of the undertaking by failing to seek his release from it by the Tribunal can only be regarded as misconduct. Mr Davey submitted that Mr Kennelly was clearly aware of his obligation but took no steps. He did nothing about his obligation having assigned the matter to the 'too hard basket'.

[18] His submission was that undertakings given to the Tribunal must be taken seriously. He relied on the decision of the Court of Appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society*¹. The Court said at paragraph [48]:

There may be cases where a breach of an undertaking may not warrant some form of disciplinary action, but such cases are likely to be rare. Usually, disciplinary action will be justified at a level appropriate to the circumstances. A deliberate breach or one involving gross carelessness may justify a charge of professional misconduct under s 112(1)(a) of the 1982 Act or its equivalent under s 241(a) of the 2006 Act.

[19] Mr Davey referred to the statement by the authors of the text *Ethics, Professional Responsibility and the Lawyer* at [15.9.1]:²

That the duty to honour undertakings is strict means even when a lawyer has erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made.

[20] We find that Mr Kennelly's breach of the undertaking has reached the threshold of misconduct having determined that it was dishonourable. As an experienced practitioner he was fully aware of his obligation but chose to do nothing about it. We find the breach was deliberate. We adopt what the Court of Appeal said in *W* at paragraph [52]:

¹ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401.

² Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed), LexisNexis, Wellington, 2016.

We consider that members of the public would be likely to view a breach of a lawyer's undertaking as tending to bring the profession into disrepute irrespective of whether it was given voluntarily and without personal gain to the lawyer.

[21] We have noted that it is accepted by the Committee that Mr Kennelly has made a good effort in cleaning up his trust account under the supervision of Mr Anderson. It does not oppose Mr Kennelly being released from his undertaking despite the fact he should have sought release without the Committee having to refer the matter to the Tribunal. We accordingly release him from the undertaking he made to the Tribunal.

Breaches of Trust Account Regulations and Conduct and Client Care Rules

[22] Mr Kennelly has acknowledged the breaches which are set out in paragraphs [7] and [8] of this decision. We have not found it necessary to expand on the facts as set out in the particulars of charge.

[23] The Committee has acknowledged that Mr Kennelly's failure to ensure that the IBD Account was reconciled with the trust ledger was not a matter that amounted to misconduct or negligence.

[24] The Committee has submitted that the remaining breaches of regs 9(2) and 12(7) and rule 3 either individually or cumulatively amount to misconduct or negligence under s 241(c) of the Act for the following reasons:

- (a) Mr Kennelly did not act in a timely manner to address dormant balances despite having been reminded to do so as far back as July 2013.
- (b) His failure to report to clients with a statement of trust monies held every 12 months extended over a period of years.
- (c) His deduction of fees without sending an invoice in respect of two matters arose because he had overlooked doing so after matters had been finalised some years earlier.

[25] Mr Neutze submitted that the breaches Mr Kennelly has admitted in this matter are not of the same level of seriousness as in the matter which came before the Tribunal in November 2017. He submitted that we should take into account the Inspectorate's confirmation that his client has made a good effort in cleaning up his trust account under the supervision of Mr Anderson.

[26] Mr Neutze argued that addressing the legacy of dormant balances is a matter that takes time and that Mr Kennelly has made good progress.

[27] Mr Neutze further submitted account should be taken of the Committee's acceptance that the breaches in respect of the IBD trust account balances are not matters which amount to misconduct or negligence.

[28] We have decided that a finding of unsatisfactory conduct is made in respect of this charge. We do so for the following reasons:

- (a) We take into account the underlying background regarding Mr Kennelly's trust accounting software.
- (b) The acknowledged progress that Mr Kennelly has made in clearing outstanding matters.
- (c) The improved operation of his trust account observed by and reported on by Mr Anderson.
- (d) Mr Kennelly has taken full responsibility for the trust account.

[29] At the conclusion of the hearing the Tribunal made the following orders:

- (a) Imposed a fine of \$20,000.00. The size of this substantial fine is to reflect the seriousness with which the Tribunal regards Mr Kennelly's actions in failing to adhere to his undertaking and failing to seek a release from it from the Tribunal when his circumstances changed.
- (b) Mr Kennelly is to pay the costs of the New Zealand Law Society fixed at \$12,707.50.

- (c) Mr Kennelly is to refund to the New Zealand Law Society the costs of the Tribunal which are certified at \$2,354.00.
- (d) The New Zealand Law Society are to pay the Tribunal costs certified in the sum of \$2,354.00.
- (e) Mr Kennelly will continue to employ Mr Anderson at his cost to provide ongoing support and supervision of the management of his trust account until 31 January 2021.
- (f) Mr Kennelly will pay all dormant balances as agreed between counsel and held for his clients in his trust account and on IBD to those clients or, if that clients cannot be located, to Inland Revenue by 30 June 2020.

[30] The Tribunal delivered a censure to Mr Kennelly in the following words:

We censured you on 30 November 2017. Today we repeat those words except that we say to you that you have escaped suspension. We do so reluctantly, if the warning we gave you then is to have meaning and impact. We have stopped short of doing so today because of the progress you have made in respect of your trust account.

DATED at AUCKLAND this 11th day of February 2020

BJ Kendall
Chairperson

Charges (LCDT 024/19)

THE AUCKLAND STANDARDS COMMITTEE NO.2 OF THE NEW ZEALAND LAW SOCIETY charges **PATRICK JAMES KENNELLY** under s 241 of the Lawyers and Conveyancers Act 2006 (**the Act**) with:

1. misconduct, namely conduct that occurred at a time when he was providing regulated services and consisting of conduct that was wilful or reckless contraventions of:
 - 1.1. regs 9(2), 12(7) and 14 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (**Trust Account Regulations**); and/or
 - 1.2. rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Conduct and Client Care Rules**).
2. negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practice or as to bring his profession into disrepute; or
3. unsatisfactory conduct consisting of contraventions of regs 9(2), 12(7) and 14 of the Trust Account Regulations and/or rule 3 of the Conduct and Client Care Rules.

Particulars

Deducting fees without sending an invoice - reg 9(2) Trust Account Regulations

- (a) On 20 August 2018 Mr Kennelly debited the sum of \$55.90 from the trust account for W H (2008) Ltd as fees for his practice. Before or immediately after the fees were debited on 20 August 2018 Mr Kennelly did not deliver or post an invoice for those fees to W H (2008) Ltd.
- (b) On 22 August 2018 Mr Kennelly debited the sum of \$267.33 from the trust account for the estate of F W as fees for his practice. Before or immediately after the fees were debited Mr Kennelly did not deliver or post an invoice for those fees to the executor of Mr W's estate.

Dormant balances not paid to clients – rule 3 Conduct and Client Care Rules

- (c) In providing regulated services to his clients, Mr Kennelly did not in a timely manner pay money held in his trust account to the clients in Schedule 1.

Failure to report to clients about funds held on trust – reg 12(7) Trust Account Regulations

- (d) Mr Kennelly did not provide to some or all of the clients in Schedule 1 a complete and understandable statement of all trust money handled for the clients, all transactions in the client's account, and the balance of the client's account in respect of all transactions that were not completed within 12 months, at intervals of not more than 12 months or in respect of all other transactions, promptly after or prior to the completion of the transaction.
- (e) Mr Kennelly did not provide to some or all of the clients for whom trust money was held on interest bearing deposit as listed in Schedule 2 of these charges a complete and understandable statement of all trust money handled for the clients, all transactions in the client's account and the balance of the client's account in respect of ongoing investment transactions, at intervals of not more than 12 months.

Failure to reconcile IBD account – reg 14 of the Trust Account Regulations

- (f) Between 30 September 2018 and 18 December 2018 Mr Kennelly failed to ensure that the interest-bearing deposit bank account with Bank of New Zealand was reconciled with the trust ledger as at the end of September 2018.
- (g) Between 31 October 2018 and 18 December 2018 Mr Kennelly failed to ensure that the interest-bearing deposit bank account with Bank of New Zealand was reconciled with the trust ledger as at the end of October 2018.

Summary

- (h) These particulars either separately or cumulatively amount to misconduct as alleged or, in the alternative, negligence pursuant to s241(c) of the Act or, in the further alternative, unsatisfactory conduct.