

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2021] NZLCDT 4

LCDT 005/21

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

AND

JESSE SEANG TY NGUY

Practitioner

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms N McMahon

Ms S Stuart

DATE OF HEARING 2 March 2021

HELD AT Specialist Courts and Tribunals Centre, Auckland (by AVL)

DATE OF DECISION 2 March 2021

DATE OF REASONS 3 March 2021

COUNSEL

Mr P Collins for the Auckland Standards Committee

Ms M Taylor-Cyphers for the Practitioner

DECISION OF THE TRIBUNAL RE INTERIM SUSPENSION APPLICATION

Introduction

[1] The Standards Committee applies on notice under s 245(1) of the Lawyers and Conveyancers Act 2006 for an interim order suspending Jesse Seang Ty Nguy from practice as a solicitor until charges against him have been brought and disposed of.

[2] Following the hearing of the Application the Tribunal made an Order for Mr Nguy to be suspended from practice effective immediately. This decision provides the reasons for that Order.

[3] This application arises in the context of the practitioner's misapplication of funds (over \$1.3 million), failure to honour an undertaking in respect of those funds, and a pattern of untruthful statements. This interim application, in our view, required prompt consideration.

[4] This case concerns the financial interests of the complainant (a former client), other clients whose funds might be at risk and most importantly the interests of the public [s 245(2)(a)] which arise from Mr Nguy's unauthorised application of funds in his trust account and his related course of dishonest representations.

[5] Mr Nguy's opportunity to tell his side of the story began well before the hearing. He has had notice of the New Zealand Law Society's rising concerns since late December 2020. He has been approached repeatedly for information on behalf of the Standards Committee by Mr Kitching as Investigator and by Ms Loveys from the Inspectorate. In December 2020, Mr Nguy instructed Mr Laubscher as counsel to represent him. Later, Ms Taylor-Cyphers was engaged as his representative. Each of them made representations but their representations mainly challenged the process and alleged incomplete results of the investigations. Pertinent questions asked by Mr Kitching and the Standards Committee remain unanswered. The

practitioner's lack of candour sits against a disquieting background of evasion, delay, breached undertakings and client loss.

[6] The issues we must address are:

- Does Mr Nguy's management of his trust account cause us such concern for the interests of the public that he should be suspended pending hearing of the charges?
- Is that concern sufficiently allayed by Mr Nguy's engagement with Mr Anderson as co-signatory of the trust account?

What are our trust account concerns?

[7] There is no need, in this judgment, to traverse exhaustive detail. Certain facts are sufficiently stark to explain why we make the interim order of suspension. Although the facts set out below do not cover all matters of concern to the Standards Committee, they constitute, within themselves, a balanced narrative for the purposes of disposing of this interim application.

[8] Mr Nguy acted for a purchaser of a piece of real estate. The named purchaser on the agreement was a client, Mr C (whose name we suppress). The practitioner joined in the transaction through the vehicle of a trust. It was proposed that the trust would purchase through a company (NDHL). The practitioner's shares in NDHL were held by Mr C on trust as recorded in a Deed of Declaration of Trust. Thus, as far as the vendor's solicitors were aware, the purchaser was Mr C via the company. The practitioner's involvement was concealed.

[9] The purchase price was \$1,888,000. The deposit of \$188,000 was paid on 14 November 2019 from the practitioner's trust account. The sum was sourced from funds held in the trust account for another client, unconnected with Mr C or NDHL.

[10] Funds to help complete the purchase were arranged by mortgage loan from a New Zealand bank (name suppressed). On 30 January 2020, the practitioner gave a solicitors' certificate to the bank in the usual form. Consequently, the bank deposited \$1,321,600 into the practitioner's trust account on 7 February 2020.

[11] Settlement was due on 31 January 2020. The practitioner failed to settle. Instead of applying the bank funds towards settlement, the practitioner applied them to a variety of other payments. In all, between 2 March and 24 July 2020, the practitioner made 14 separate payments from the funds provided by the bank for the property purchase by Mr C (via NDHL). Those payments included (among others) payments of debts owed by the practitioner to two barristers; payments for renovation work on a Devonport property; and \$855,964 to Melbourne lawyers to settle purchase of an apartment for another client. No credible evidence has been provided to show that any of these payments related to matters concerning Mr C or NDHL, or that they were authorised by Mr C.

[12] Between 31 January 2020 and June 2020, there was correspondence between the practitioner and the vendor's solicitors who sought settlement. On 12 June 2020, the practitioner advised his client could settle. On 19 June 2020, he advised "*the delay in settlement is largely due to the effect of the Covid-19 epidemic namely, part of our clients funds were unable to be transferred to New Zealand due to the lockdown overseas and the bank only operating with half capacity.*"

[13] The vendor took summary judgment proceedings against Mr C. The practitioner was apprised of the action throughout. The vendor obtained summary judgment against Mr C in the High Court on 3 November 2020. The Court order records that the practitioner acted for Mr C in the summary judgment proceeding and consented to the terms of the order on behalf of his client, Mr C. The fact of judgment seems to have prompted Mr C's complaint to the Law Society.

[14] While summary judgment proceedings were underway, the practitioner made various representations to the vendor's solicitors. These included a representation on 7 October 2020 that the delay in settling was predominantly due to the impact of Covid-19 in Europe from where his client was expecting the funds for the purchase. On 2 November 2020, the practitioner's firm advised in writing that they "*have spoken directly to our client's business acquaintance overseas and have been assured that they are very confident that the funds will be available shortly.*"

[15] On 1 December 2020, an email from the practitioner to the vendor's solicitors referred to a "Stephen R Kelly." On 7 December 2020, further delays were explained by Mr Nguy suggesting banks in New York and the UK were now involved.

[16] On 8 December, the vendor's solicitors received an email from a Stephen Kelly advising that he was not the author of emails provided by the practitioner. Mr Kelly advised "*We are a small accounting firm in Northern NSW Australia and have no attachment to these emails.*" Although this is only indicative, it fits with the other misleading representations made by the practitioner that settlement was held up by reasons attaching to people or banks offshore. We do not rely on this item but note it fits with the pattern.

[17] Although the practitioner asserts that Mr C gave instructions for the various payments to be made, Mr C disputes that. In our assessment, it seems improbable that any of these payments were authorised by Mr C. In any case, the payments are in clear breach of the practitioner's obligations to the bank. Mr Nguy has not provided documentation to demonstrate the probity of his conduct.

[18] We find that Mr Nguy made multiple unauthorised payments from his trust account as detailed above. These involve deliberate actions which he covered by materially misleading the vendor's solicitor over many months.

[19] It is a fundamental obligation on solicitors to be scrupulous in dealing with client funds. Mr Nguy's conduct in this case has shown repeated breaches covered by associated dishonest representations. We are readily satisfied that it is in the interests of the public to suspend Mr Nguy from practice until the charges against him have been disposed of.

Is Mr Anderson's role a sufficient safeguard?

[20] Our concerns about Mr Nguy's trust account dealings sit within a context of associated concerning behaviours, namely his dishonest representations over many months, listed above.

[21] For the practitioner, it is argued that his installation of Mr Anderson, a former senior inspector with New Zealand Law Society, as a co-signatory of his payments, is a sufficient safeguard. Also, the practitioner would like to have time to transfer his practice.

[22] We do not question Mr Anderson's reliability so far as it can extend. However, his input in para [11] of his affidavit where he says, of the interim investigation report of Mr Kitching, that "*I disagree with many of its findings which I find speculative...*" is unhelpful because it offers no substance. We cannot give any weight to that comment.

[23] Mr Collins and Mr Kitching point to the structural defect in Mr Anderson's position. He is reliant on what Mr Nguy shows him. Given Mr Nguy's demonstrated pattern of dishonest representations and actions to fob off adverse outcomes, we are not at ease with the security of the arrangement. And, as Mr Collins observes, the credible evidence of misappropriation makes it unacceptable for Mr Nguy to continue in practice. This is so, whether or not he engages a co-signatory.

[24] Running a solicitor's practice involves many significant dealings that are not trust account matters. They include giving solicitor's certificates, providing undertakings, and signing and certifying transactions in LINZ. These are matters beyond the reach of Mr Anderson's oversight.

[25] Mr Nguy asks for an adjournment so he can arrange to surrender his practising certificate voluntarily after he has made arrangements for a practitioner to take over his practice. He expects the holder of one of his powers of attorney to arrive in New Zealand and begin managed isolation shortly. Ms Taylor-Cyphers seeks on his behalf, time to arrange this. She submits the presence of Mr Anderson mitigates current risks.

[26] We regard the risks pertaining to the character of Mr Nguy as disclosed by his conduct to be such that waiting for Mr Nguy's attorney to become available, even with Mr Anderson's support, presents too high a risk to Mr Nguy's clients, the legal profession and the interests of the public. In our view, the risks remain imminent for so long as Mr Nguy has the right to practise.

[27] Simply put, we find that Mr Nguy's misappropriations render him unfit to practise in the interim. We do not accept that this is akin to a situation where a practitioner has made a mild error and should be accorded leniency to allow him or her to carry on with a co-signatory. Because of his pattern of dishonest representations, we do not trust Mr Nguy. Nor do we trust that he will be frank with

Mr Anderson. His trust account appears to be in disarray. We would be wanting in our duty to the public and to the community's confidence in the legal profession if we were to fail to suspend Mr Nguy immediately.

Order

[28] We were advised that a suitable attorney was standing by. On 2 March, after deliberating (following the hearing) we ordered that Mr Nguy is suspended from practice as a barrister or solicitor or both, with immediate effect until the charges have been disposed of.

DATED at AUCKLAND this 3rd day of March 2021

Judge JG Adams
Deputy Chairperson