

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2017] NZLCDT 27

LCDT 006/17

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

GEORGE BOGIATTO

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms A Callinan

Ms C Rowe

Mr T Simmonds

Mr W Smith

HEARING at the District Court, Auckland

DATE 22 September 2017

DATE OF DECISION 6 October 2017

COUNSEL

Mr J Parry for the applicant

Mr J R Billington QC for the respondent

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

[1] The applicant has charged the respondent with misconduct within the meaning of s.7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (the Act) in that he wilfully or recklessly contravened provisions of the Act and/or any regulations or practice rules made under the Act that apply to him in the provision of regulated services.

[2] The breaches of the Act are:

- a. Breach of s.110(1)(a) by not banking cheques in a timely manner;
- b. Breach of s.112(1)(c) by not keeping records in such a manner as to enable those records to be conveniently and properly audited or inspected.

[3] The breaches of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations) are:

- a. Breach of reg 8 by using a trust account for personal transactions otherwise than in accordance with reg 8;
- b. Breach of reg 9(2) by debiting a trust account with fees of a practice where no invoice has been delivered or posted to the person who has a legal or beneficial interest in the trust account debited, before or immediately after the fees were debited;
- c. Breach of reg 11(1) by not keeping records required by s.112 of the Act to be kept in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate;

- d. Breach of reg 11(4) by not ensuring journal entries included sufficient detail to make their purposes evident;
- e. Breach of reg 12(7) by not properly reporting to clients on trust money transactions.

[4] There are alternative charges of negligence or incompetence (s.241c) of the Act and unsatisfactory conduct (s.12(a) and/or (b)) of the Act.

Background

[5] The respondent's trust account and associated practices were reviewed in May 2011 by the NZLS Inspectorate. That review identified issues which were reported to the Committee. The Committee issued a Notice of Determination dated 26 January 2012 which found the respondent's conduct to be unsatisfactory on the basis of breaches of the Act and the Regulations and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. There were two issues that are relevant to this present charge being a number of unrepresented cheques and his action of conducting personal transactions through his trust account contrary to reg 8 of the Regulations.

[6] The respondent gave assurances to the Committee that he would adopt new processes to avoid a recurrence of the breaches.

[7] The Inspectorate of the New Zealand Law Society carried out a Limited Review of the respondent's trust accounts of his firm and supporting documentation. The Inspector identified the following deficiencies in the respondent's trust account records and practices:

- a. The adequacy of the trust account supervision role of the respondent;
- b. The respondent's use of the trust account for personal transactions;
- c. Specific file review issues which contravened the Act and/or the Regulations.

Failure to bank cheques in a timely manner

[8] The respondent received and receipted cheques for money to be held on trust on behalf of clients on 5 occasions between 31 December 2015 and 23 February 2016 all of which were not banked until later dates.

[9] The applicant noted that this was a repeat of conduct that had occurred at the time of its Determination of 2012 and about which the respondent had given an assurance that a recurrence of the practice would not take place.

Personal transactions

[10] The respondent held funds in his trust account under several matters relating to his own affairs and investments. In respect of two such matters the ledgers recorded private and/or personal transactions from the trust accounts being payments to his family trust; his former partner; his current partner; payments for work carried out on property owned by the respondent's partner but not related to the trust account matter in question.

[11] Again, these payments were a repetition of matters arising under the Determination of 2012 where trust accounts were used for personal transactions and about which a finding of unsatisfactory conduct had been made.

Other Issues

[12] The respondent did not keep records in such a manner as to enable them to be conveniently and properly audited or inspected. There were no client files for 4 matters. In addition a large number of transactions contained the narration "payment as authorised" the allegation being that such narration was insufficient to identify the purpose of the transactions to which they related.

[13] In another matter, the respondent had debited a client trust account with practice fees without an invoice having been delivered or posted to the client before or immediately after the fees were debited. The respondent later adjusted and reissued a subsequent invoice which did not show the initial unsent invoice.

The allegation is that the adjusted invoice did not show a complete and understandable statement of the trust account transactions.

[14] The respondent has admitted that he is guilty of unsatisfactory conduct. He disputes that he is guilty of professional misconduct.

[15] The applicant and the respondent have discussed the issues in these proceedings. As a result of those discussions the areas of dispute have been narrowed. The fundamental difference is that the applicant submits that where the respondent has previously been investigated by the Committee and has been found to have breached the Act and the regulations (including a finding of unsatisfactory conduct) and has given assurances that processes have been put into place to avoid those breaches recurring, recurrence of that conduct can only be seen as misconduct. The respondent argues that the matters to which he has admitted amount to unsatisfactory conduct.

[16] Against that difference, the committee and the respondent have filed a joint summary of issues which this decision addresses.

Issue 1 – Failure to bank cheques in a timely manner

[17] This issue relates to five cheques received between 31 December 2015 and 22 February 2016 not being banked promptly as required by s.110(1)(a) of the Act. The respondent admitted that prompt banking of the cheques did not occur. He stated that the likely explanation in respect of two cheques receipted to the ledger in December 2015 and January 2016 was that they arrived during the Christmas period while no one was present in his office. In the case of the cheque received on 22 February 2016 the respondent stated that he was unable to explain the delay. He said that he understood that the cheque was retained on the file by his solicitor employee and he did not discover it until later. He gave no explanation in respect of the remaining two cheques which were not banked promptly.

[18] The respondent was cross examined about this issue and the other matters which relate to personal transactions, adequacy of records and the debiting of a client trust account without an invoice being delivered.

[19] The respondent, in answer to questions put to him by counsel for the applicant, said that his office was closed on December 31 2015. He wasn't aware that his legal executive had come into the office then but knew that she was going on extended leave. It was put to him that there were trust account transactions recorded between 4 and 19 January 2016 which lead to the conclusion that the office was attended and that banking of cheques could have been made.

[20] The conclusion therefore is that the Tribunal does not accept the explanations given by the respondent for the delay in banking the three cheques referred to. At best he has attempted to find a credible explanation for the failure and has not succeeded in doing so. It notes that the respondent has not provided an explanation for the failure to bank the other two cheques promptly.

Issue 2 – Personal transactions

[21] The respondent used the trust account for personal transactions. Those payments included payments to a family trust created for the benefit of his daughter; and payments to and on behalf of his former partner and present partner.

[22] The respondent has admitted the transactions. He explained that the personal transactions occurred at his direction and that they should not have happened. He also said that the notation "payment as authorised" occurred because he did the authorising. It was something he had done for 20 years and he "fell into the trap" of including personal payments.

[23] He was referred to the Committee's determination of 26 January 2012 where it was noted that he had accepted that no personal transactions were to be paid via the trust account. He said that he knew that it was important not to use the trust account for personal transactions.

[24] The respondent denied that payments from the trust account to the family trust were personal transactions. He did admit that the payments were for the rent of a property owned by the trust of which he was the tenant and in which he lived. The Tribunal accepts the submission of counsel for the applicant that the payment of rent is a payment of a personal nature made from the respondent's trust account and is a breach of reg 8 of the Regulations.

[25] It follows that the recorded personal transactions which the respondent has admitted are transactions made in breach of the Regulations.

Issue 3 – Adequacy of records

[26] The particulars in respect of this issue are that the respondent did not keep client files in respect of four matters and that a large number of transactions were identified where the narrations read only "payment as authorised". The respondent has by inference acknowledged the failure by stating that files for the respective matters have now been created.¹

[27] The respondent said that the narration "payment as authorised" was generally only used in relation to his own affairs when making a payment to a third party or to himself. It was used when making a payment to a client of his or her funds at the request of that client. He accepts the inadequacy of that narration.

Issue 4 – Debiting trust account with fees without posting an invoice to the client

[28] The essence of this matter is that an invoice for fees was created on 17 June 2014 and the sum payable was transferred to the respondent's accounts receivable. Subsequently the client made four further payments on account of costs. An invoice was rendered on 7 September 2015 for fees totally \$10,925. It was subsequently cancelled and reissued on 1 April 2016 for \$7,043.75 to take into account the previous invoice. The client was sent a statement of account which did not record

¹ Refer paragraphs 16-19 of respondent's first affidavit sworn on 31 May 2017.

the earlier invoice but showed a tax invoice for \$5,175 and a further tax invoice for \$10,925 making a total of \$16,100.

[29] The inference drawn by the Inspectorate was that the earlier invoice had remained on the file and was not sent to the client. The respondent said that this was not a matter in which he had any personal involvement but was in the hands of his former employee solicitor. Whether or not the invoice was sent becomes a moot point when the respondent acknowledges that the statement did not record the relevant transactions.

Discussion

[30] Counsel for the respondent accepts that the matters in issue may be looked at cumulatively. He submitted that the essential elements of the charge of misconduct require proof that the respondent acted in “wilful or reckless contravention of the Act and/or the Regulations. He submitted that it had to be proved that the respondent himself, as opposed to any member of the staff, acted with a conscious and deliberate intention to depart from the Act or Regulations.

[31] He submitted that in the alternative what was required to be shown was that the respondent’s personal conduct was “reckless”. That required an assessment of whether the respondent consciously appreciated the risks of his behaviour, ignored those risks and therefore acted recklessly.

[32] Counsel submitted that common definitions of recklessly are found under the criminal law and by analogy the same intentions are ascribed to the offender. He referred to s.11 of the Summary Offences Act 1981 which provides for the doing of an act “intentionally or recklessly”. His submission was that there must be a conscious taking of the risk, it not being sufficient that the defendant failed to give thought to a serious risk or would have foreseen it if pause had been taken to think about it.

[33] His submission was that the evidence against the respondent fell short of proving the requisite intent.

[34] The applicant has argued that the respondent deliberately departed from accepted standards and that a finding of misconduct by the Tribunal is available and appropriate. Counsel referred to the decision in *Complaints Committee No. 1 of the Auckland District Law Society v C*², where reference was made to “a deliberate departure from accepted standards” and also behaviour portraying indifference.

[35] The Tribunal has approached its decision in this matter by reference to the decision of the High Court in *Zhao v Otago Standards Committee of the New Zealand Law Society*³. Toogood J approved the decision of the Tribunal in *Auckland Standards Committee No 5 v Holmes*⁴ where it made a finding of reckless contravention of the Act and the Regulations inferring that Mr Holmes “simply did not turn his mind to his obligations and was therefore reckless”.⁵

[36] The Tribunal finds that the respondent was reckless in respect of the issues such as to amount to misconduct. It has taken into account the following:

- a. The respondent was disciplined by Auckland Standards Committee in January 2012 for breaches of the Act and Regulations involving personal transactions through his trust account and for the non cancellation of un-presented cheques.
- b. The respondent gave an assurance that he had adopted practices to avoid repetition of such breaches and that no personal transactions would be paid for via the trust account from his own funds.
- c. The breaches which the respondent has admitted in these proceedings are identical in material aspects to the matters for which a finding of unsatisfactory conduct was made in 2012.

² *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

³ *Zhao v Otago Standards Committee of the New Zealand Law Society* [2017] NZHC 1971 [17 August 2017].

⁴ *Auckland Standards Committee No 5 v Holmes* [2011] NZLCDT 31.

⁵ *Zhao* at paragraph 50.

- d. That the respondent on his own admission was essentially carrying on his practice in the same manner as previously found to be unsatisfactory.
- e. That the respondent ignored his obligations which were made clear to him in the committee's determination of 2012.

[37] Having found that the respondent recklessly contravened the provisions of the Act and the Regulations, the Tribunal records that the charge of misconduct against the respondent is proved.

[38] The Tribunal directs that submissions on penalty be filed by the applicant by 20 October 2017. Counsel for the respondent is to reply by 3 November 2017. Penalty will be decided on the papers unless either of counsel requests a hearing.

DATED at AUCKLAND this 6th day of October 2017

BJ Kendall
Chairperson