NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 28

LCDT 016/17

BETWEEN **CANTERBURY WESTLAND STANDARDS COMMITTEE No. 2**

Applicant

JULICA LOUIE CARMICHAEL

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Mr A Lamont

Mr S Maling

Mr B Stanaway

HEARING at the District Court, Christchurch

DATE 9 October 2017

DATE OF DECISION 19 October 2017

COUNSEL

Mr H D P van Schreven for the Applicant

Mr T J Mackenzie for the Respondent

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

Introduction

[1] The respondent has admitted a charge of misconduct under s 241(1)(a) of the Lawyers and Conveyancers Act 2006 (the Act) in that she wilfully or recklessly contravened Rule 2.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and s 164A of the Land Transfer Act 1952 (the LT Act). She has also admitted alternative charges of unsatisfactory conduct (s 241(1)(b) of the Act) and of negligence or incompetence (s 241(1)(c) of the Act.

[2] The substance of the charge is that the respondent created a false document and then falsely certified it in order to shortcut a transaction.

Facts and context

[3] The facts are taken from the submissions of counsel for the respondent in the context where the respondent's client was obtaining a finance facility from a bank.

[4] An existing property was offered as security, title to which had been held by a company owned by the client. That company had been removed from the Register. Title to that property needed to be in the name of the client in order to obtain the finance. As the company was not registered, the property had become vested in the Crown as *bona vacantia* by operation of s 324 of the Companies Act 1993, although such vesting did not change the title itself.

[5] There were delays which resulted in pressure being placed on the respondent to complete the finance transaction. She needed to complete a process to have the company restored to the Register; have ownership of the property restored to the company from the Crown; and then have title transferred to the client to allow registration of the bank's security.

[6] There was a process available. The respondent instead falsely completed an Authority & Instruction (A&I) in the client's name to transfer the property directly from the company to the client. She had backdated the A&I to a time when the company was still registered.

[7] The respondent created the false A&I by physically cutting the client's signature from an A&I already held for the client and glueing it on to the false A&I. Her actions were described by both counsel as unsophisticated. The corresponding certifications then made to LINZ were false.

[8] The process taken by the respondent allowed the finance lending to occur in time to meet the client's requirements.

The hearing

[9] The respondent was sworn and answered questions from both counsel and members of the Tribunal. The Tribunal then heard from counsel for the applicant, Mr van Schreven, and Mr Mackenzie for the respondent. After retiring to consider penalty, it returned and imposed the censure and orders that are recorded at the end of this decision. It reserved its reasons for decision which are now recorded.

Principles in addressing penalty

[10] The starting point for considering penalty is the seriousness of the conduct in question.

[11] Both counsel accept that the respondent's conduct was a serious breach of a solicitor's duties when account is taken of the importance that certifications have in a conveyancing practice. It allows lending institutions to have "*full confidence*, *not only in a lawyer's honesty, but of his or her standards of diligence and care.*[1]"

[1] *Standards Committee 3 of the Canterbury/Westland Branch of New Zealand Law Society v Woulfe* [2017] NZLCDT 5, at [16].

Matters aggravating the offending

[12] Counsel for the applicant submitted that the following matters aggravated the respondent's conduct:

(a) Her conduct was deliberate and was made worse by her awareness that the transaction could not proceed unless she created the false document;

(b) Despite having the ability to apply to restore the company to the Register, she did no more than make enquiries about what was required;

(c) Having received instructions for the Bank, advising it of the intended process to remedy the situation, she did nothing to effect the remedy;

(d) She falsely dated the second A&I, did not certify it as required and the witnessing section was left blank;

(e) She then released the documents and submitted a dealing to LINZ for registration, with the effect that in reality the bank was not provided with a registered first mortgage.

[13] Counsel for the respondent vigorously challenged the applicant's submitted aggravating factors. His submission was that those factors were elements that went to the acceptance of serious misconduct and did not go to make that conduct worse. He submitted that 'deliberateness' does not add to the misconduct. He instanced aggravating factors as being:

(a) Allowing fraud by a third party to occur;

(b) Personal gain;

(c) Loss to a party.

[14] He submitted that there were no aggravating factors over and above the plain facts and related statutory breaches.

[15] The Tribunal accepts that submission and finds that there are no aggravating factors to the respondent's conduct.

Matters of mitigation

[16] Both counsel agree on the following mitigating factors:

(a) The respondent's ready and open acknowledgment of her misconduct when that was put to her by her firm and then by the Standards Committee;

(b) Her high level of personal stress arising from an acrimonious separation from her partner extending to issues affecting the care of her young children;

(c) Her work environment having become difficult leading to performance reviews and a feeling of isolation in that environment;

(d) Her having no previous matters with the Lawyers Complaint Service;

(e) There was no element of personal gain. Her focus was on achieving an outcome for her clients.

[17] Mr Mackenzie submitted additional mitigating factors on behalf of the respondent as being:

(a) She is a young practitioner who, if more experienced, may have had a greater appreciation of the seriousness of her actions, and greater vigilance against bowing to client pressure;

(b) She now has the support of her employer, a senior practitioner, with the benefit of assistance and supervision;

(c) She has had a two month break from practice after leaving her previous employment for which credit can be given[2].

Discussion on penalty

[18] Both counsel have referred the Tribunal to a number of decisions. The principle of the "least restrictive outcome" does not require repeating. It is well established.[3]

[19] Counsel for the applicant submitted that a period of suspension was the appropriate penalty to impose notwithstanding her previous unblemished record and the mitigating factors agreed on. He emphasised the deliberate nature of the offending and the necessity for LINZ to be able to rely upon the certifications given to it by the practitioners. Any penalty therefore needed to reflect the gravity of the offending and the potential serious consequences to the indefeasibility of title.

[20] Mr van Schreven accepted the submission that the respondent's precarious financial position made the imposition of a fine not suitable as a penalty as was the case in *Woulfe*[4]. The Tribunal agrees.

[21] Mr Mackenzie submitted that a censure and an order not to practise on her own account[5] would adequately mark the respondent's conduct and meet the disciplinary needs of the case.

[22] He submitted that publication (while not a penalty *per se)* would be particularly onerous on the respondent as a young practitioner, making any future employment or partnerships a difficult exercise.

[23] As to general and specific deterrence, Mr Mackenzie submitted that the respondent's conduct leant towards the unique and unusual and that it was not such that other practitioners might be at risk of committing.

---

[2] *Southland Standards Committee v W* [2013] NZLCDT 28, at [44].
[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR [850].
[4] See above n 1.
[5] Section 242(1)(g) of the Act.

[24] He emphasised the mitigating factors and submitted that the Tribunal could be satisfied that the respondent is a genuine, capable and otherwise honest lawyer who made a grave one-off mistake in extenuating personal circumstances. He opined that she will not be seen in the disciplinary jurisdiction again.

Decision

[25] While reference to other cases is usual, the Tribunal recognises that each case is individual and that it must determine penalty accordingly having regard to the range of penalties available to it.

[26] The Tribunal has taken into account the factors that mitigate in favour of the respondent. It has paid particular regard to the respondent being a young practitioner and that she now has the supervision and support of her present employer, a senior practitioner.

[27] The Tribunal's decision was to impose the following:

(a) A censure upon the respondent;

(b) An order not to practise on her own account, until authorised by the Tribunal to do so (s 242(g));

(c) An order to pay the costs of the applicant in the sum of $4,275.00;

(d) An order to refund to the New Zealand Law Society the costs of the Tribunal which are certified in the sum of $2,820.00.

[28] The Tribunal makes an order for the non-publication of the names of the complainant firm and its principal and of the names of any clients referred to in the proceedings.

[29] The Tribunal delivered the following censure to the respondent:

The ability to practise law is hard won and is a privilege. Lawyers in New Zealand are particularly privileged in that they are in a unique position of being able to change the Land Title register subject to compliance with strict criteria. That compliance is a responsibility that in this case you entirely abdicated.

In the words of your own counsel, it was the blatant forgery of a sacred document. You allowed your circumstance both personal and professional to overwhelm you. You did not seek help when you should have.

Such a failure cannot go unmarked by this Tribunal which has a responsibility to the public and to the legal profession to provide protections from such behaviour.

DATED at AUCKLAND this 19th day of October 2017

BJ Kendall
Chairperson