

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2017] NZLCDT 37

LCDT 005/17

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE No. 2**

Applicant

AND

PATRICK JAMES KENNELLY

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr C Lucas

Ms C Rowe

Mr P Shaw

Mr I Williams

HEARING at the Specialist Courts and Tribunals Centre, Auckland

DATE 30 November 2017

DATE OF DECISION 20 December 2017

COUNSEL

Mr P Davey for the Applicant

Mr M Atkinson for the Respondent

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

[1] The respondent has admitted a charge of 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 practise or as to bring his profession into disrepute. (s 241(c) of the Act). The charge relates to breaches of s 112(1)(a) and (c) of the Act, breaches of the Trust Account Regulations and of the Conduct and Client Care Rules. Particulars of the charge are annexed as Appendix 1.

[2] The Tribunal was satisfied that the respondent's admission of the charge was appropriate. It granted the applicant leave to withdraw the alternative charges of misconduct and of unsatisfactory conduct.

[3] Having heard from counsel for the applicant and counsel for the respondent, the Tribunal considered penalty and, after deliberation, imposed the following:

- (a) A censure;
- (b) A fine of \$15,000.00;
- (c) An order for payment of the New Zealand Law Society's costs totalling \$17,575.00;
- (d) An order to refund to the New Zealand Law Society the Tribunal's costs;
- (e) An order suppressing the names and details of any clients whose matters appear in the proceedings;
- (f) The Tribunal s 257 costs payable by the New Zealand Law Society are certified at \$3,410.00.

[4] This decision records the reasons for the penalty imposed.

[5] The respondent is a sole practitioner with few or no support staff at various times. He failed to manage his trust account in accordance with the regulations between 1 February 2016 and 23 November 2016. Two previous reports regarding non-compliance with trust account current rules and regulations resulted in the respondent being disciplined by the Standards Committee. On 11 February 2014, the Standards Committee recorded a finding of unsatisfactory conduct for which he was ordered to pay costs and a fine of \$750.00. On 31 August 2015, the Standards Committee censured the respondent for his trust account failures, ordered him to undertake and complete a Trust Account Supervisor Training programme and imposed a fine of \$4,000.00 and costs of \$1,000.00.

[6] The respondent has used a programme called PC Law to manage his trust account and has done so since 2008. He experienced difficulties in correcting errors that were made while entering transactions. He found that the software function had been disabled. After many attempts to rectify the errors, the respondent gave up. The result was that his trust account was not reconciled and he then failed to file monthly certificates within the time frame required by the regulations.

[7] The respondent was slow to seek professional help to resolve the difficulties. He purchased a more user-friendly programme known as Affinity in December 2015 which is expected to provide him with better technical support than he presently receives from the PC Law programme. He has not yet set up that system despite believing that his problems were caused by his existing trust account management system.

[8] The Tribunal has noted that there is no allegation of dishonesty involved nor that losses have been suffered by clients.

[9] We note also that the respondent has accepted responsibility and has set about rectification of the problems albeit somewhat belatedly. Until the trust account is rectified and reconciled with the bank accounts it cannot be said with certainty that there are no issues.

[10] We record, as has been said many times, that the purposes of penalty in disciplinary jurisdiction is to protect the public, to maintain the standards of the legal profession, to maintain the reputation of the profession and the public's confidence in it as a result.

[11] The starting point for assessing proper penalty is to consider the seriousness of the offending. We accept that the Tribunal has consistently emphasised the purpose and the importance of compliance with the trust account regulations and the portions of the legislation which relate to the operation of the trust account. That is because a lawyer has the privilege of handling and managing money on behalf of the client and with the trust of the client.

[12] Mr Davey for the applicant submitted that the situation created by the respondent was serious in that there were significant anomalies in the trust account which the respondent failed to reconcile for four months. He failed to file monthly certificates even though reg 17 provided that such certificates were to be filed "whether or not" the trust account was reconciled. The failures called into question his fitness to practise given that he had failed in the past and had been disciplined by Standards Committees for such failures. These were significant issues in terms of conduct and could not be treated simply as an administrative problem.

[13] The applicant argued for a short period of suspension along with a censure fine and costs.

[14] Mr Atkinson for the respondent argued that there were similarities with the cases of *Auckland Standards Committee 4 v Appleby*¹ and *Wellington Standards Committee 2 v Jones*² which involved among other matters failures to reconcile trust accounts, and failures to file monthly certificates and/or certifying monthly certificates known to be wrong.

¹ *Auckland Standards Committee 4 v Appleby* [2014] NZLCDT 34.

² *Wellington Standards Committee 2 v Jones* [2104] NZLCDT 52.

[15] Counsel submitted that both *Appleby* and *Jones* involved breaches which were more serious than the respondent's breaches particularly the filing of false certificates and, in the case of *Jones*, the use of trust money for personal benefit.

[16] Counsel emphasised that there had been no misappropriation of client funds and that there was no dishonesty on the part of the respondent.

[17] He accepted that the respondent's disciplinary history was an aggravating factor. He submitted that an order of suspension was not required in the case of the respondent.

[18] The respondent has given the following undertakings:

- (a) That Leanne Schmidt of Lexis Nexus will resolve all outstanding errors in the client ledgers by 25 December 2017 at his own cost in all respects;
- (b) He will engage a Trust Account Professional or Firm acceptable to the New Zealand Law Society Inspectorate at his cost to:
 - i. Assist with the transfer from PC Law to Affinity or such other approved Trust Account Software;
 - ii. Confirm to the New Zealand Law Society the errors in the client ledgers in PC Law have been resolved by 15 February 2018 and provide copies of supporting documents;
 - iii. Provide regular ongoing support and supervision with regard to operation and management of the Trust Account for a period of two years;
- (c) Commit to moving to Affinity or other approved Trust Account Software by 31 March 2018 and in doing so undertake the training offered by Lexis Nexus or other software provider;

- (d) To continue to maintain the entries into the Trust Account and not to delegate that function to staff unless approved by the person appointed in para (b) above;
- (e) To provide to the New Zealand Law Society copies of monthly reconciliation reports together with copies of the Trust Account Bank statements (including Interest Bearing Deposit Accounts) and client ledger listing for a period of six months on or before the due date for providing monthly and quarterly certificates from the date for the January 2018 certificate (to be filed in February 2018).

[19] The Tribunal is satisfied that those undertakings will ensure that the respondent complies with his responsibilities in the future and that the interest of the public will be protected. It reached the conclusion that a penalty other than suspension could be imposed.

[20] It accordingly imposed the penalties set out in para [3] and delivered the following censure to the respondent.

Mr Kennelly

You are censured in the strongest terms. You have admitted breaches of the trust account reporting requirements including failure to correct or declare errors and other significant anomalies. In the context of this serious offending and your past disciplinary record we state categorically that this is conduct which brought you perilously close to being suspended. Be quite clear, there will be little if any tolerance for further transgressions.

DATED at AUCKLAND this 20th day of December 2017

BJ Kendall
Chairperson

Particulars

The Committee relies any or all of the following:

Breaches of ss 112(1)(a) and (c) of the Act

1. Between 1 February 2016 and 9 June 2016 he held money in trust on behalf of clients and, in relation to the money, failed to keep trust account records that disclosed clearly the position of the money in the trust account(s) of Kennelly Law.
2. Between 1 February 2016 and 9 June 2016 he held money in trust on behalf of clients of Kennelly Law and failed to keep trust account records in such a manner as to enable those records to be conveniently and properly audited or inspected.

Breaches of reg 6 of the Trust Account Regulations

3. Between 5 February 2016 and 29 February 2016 the trust account held by Kennelly Law for the estates of J and W were overdrawn and he failed to ensure that the practice immediately lent to the estates the amount necessary to prevent those trust accounts from being overdrawn.
4. On or about 9 February 2016 the trust accounts held by Kennelly Law for C, G and/or P were overdrawn and he failed to immediately ensure that the practice lent to any or all of those clients the amounts necessary to prevent those trust accounts from being overdrawn.

Breaches of regs 11(1) and (2) of the Trust Account Regulations

5. Between 1 February 2016 and 9 June 2016 he failed to ensure that Kennelly Law kept records in respect of trust accounts in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate.
6. Between 1 February 2016 and 9 June 2016 he failed to ensure that trust account records for Kennelly Law were up to date and/or clearly showed the amount of the trust money held for each client and/or as far as practicable were secure against retrospective alteration or deletion.

Breaches of reg 14 of the Trust Account Regulations:

7. Between 14 March 2016 and 23 November 2016 he failed to ensure that the trust bank account(s) for Kennelly Law were reconciled with the trust ledger as at end of February 2016.
8. Between 14 April 2016 and 23 November 2016 he failed to ensure that the trust bank account(s) for Kennelly Law were reconciled with the trust ledger as at end of March 2016.
9. Between 13 May 2016 and 23 November 2016 he failed to ensure that the trust bank account(s) for Kennelly Law were reconciled with the trust ledger as at end of April 2016.
10. Between 15 June 2016 and 23 November 2016 he failed to ensure that the trust bank account(s) for Kennelly Law were reconciled with the trust ledger as at end of May 2016.

Breaches of reg 17 of the Trust Account Regulations

11. Between 14 March 2016 and 23 November 2016 he failed to certify the matters required by reg 17(1) of the Trust Account Regulations to the New Zealand Law Society for February 2016.
12. Between 14 April 2016 and 23 November 2016 he failed to certify the matters required by reg 17(1) of the Trust Account Regulations to the New Zealand Law Society for March 2016.
13. Between 14 April 2016 and 23 November 2016 he failed to certify the matters required by reg 17(2) of the Trust Account Regulations to the New Zealand Law Society for the quarter ended March 2016.
14. Between 13 May 2016 and 23 November 2016 he failed to certify the matters required by reg 17(1) of the Trust Account Regulations to the New Zealand Law Society for April 2016.
15. Between 15 June 2016 and 23 November 2016 he failed to certify the matters required by reg 17(1) of the Trust Account Regulations to the New Zealand Law Society for May 2016.

Rules 3.4 and 3.5 of the Conduct and Client Care Rules

16. On or before 10 December 2015 he failed to provide in writing for the Estates of J and W, information on the principal aspects of client service as required by rule 3.4.
17. On or before 10 December 2015 he failed, prior to undertaking significant work under a retainer, to provide in writing for the Estates of J and W, the client care and service information required by rule 3.5.
18. On or before 3 February 2016 he failed to provide in writing for Standard 320 Limited information on the principal aspects of client service as required by rule 3.4.
19. On or before 3 February 2016 he failed, prior to undertaking significant work under a retainer, to provide in writing for Standard 320 Limited the client care and service information required by rule 3.5.
20. In or before February 2016 he failed to provide in writing for the Estate of PD information on the principal aspects of client service as required by rule 3.4.
21. In or before February 2016 he failed, prior to undertaking significant work under a retainer, to provide in writing for the Estate of PD the client care and service information required by rule 3.5.