

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 2

LCDT 006/17

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

AND

GEORGE BOGIATTO

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms A Callinan

Ms C Rowe

Mr T Simmonds

Mr W Smith

HEARING 18 December 2017

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 22 January 2018

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 PENALTY**

[1] The respondent was found guilty of a charge of misconduct in respect of the following issues:

- (a) Failure to bank cheques in a timely manner.
- (b) Use of a trust account for personal transactions.
- (c) Inadequate record-keeping; and
- (d) Debiting trust account with fees without first posting an invoice.

[2] The full background to the charge found proved is set out in our decision of 6 October 2017.

[3] After the conclusion of the hearing regarding penalty, the Tribunal made the following orders against the respondent:

- (a) That he be censured.
- (b) That he pay a fine of \$15,000.00.
- (c) That he pay the costs of the New Zealand Law Society ("NZLS") totalling \$29,880.00.
- (d) That he refund in full to the NZLS the Tribunal's costs.
- (e) That he undertake in writing to the NZLS to engage Mark Anderson or such other person approved of by the NZLS Inspectorate to provide oversight and support in relation to the administration of his trust

account and to report to the Inspectorate on a monthly basis with regard to compliance with his obligations as a trust account lawyer. The engagement is to continue for 24 months or such lesser period approved of by the Inspectorate.

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

The Offending

[5] The starting point in considering the penalty must always be the nature and seriousness of the conduct complained of.¹

[6] We found that the respondent's admitted conduct amounted to misconduct rather than unsatisfactory conduct in that he was reckless in respect of the issues detailed in paragraph [1] above. We took into account that:

- (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.
- (d) That the respondent on his own admission was essentially carrying on his practice in the same manner as previously found to be unsatisfactory.

¹ *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103.

- (e) That the respondent ignored his obligations which were made clear to him in the Committee's determination of 2012.

[7] The applicant argued for a penalty of censure, suspension from practice for approximately six months and payment of the Law Society's costs and reimbursement of hearing costs.

[8] The submission was that, in addition to the repetitive and reckless nature of the breaches, there were aggravating features of the respondent's conduct that were relevant to the penalty that it was seeking namely:

- (a) The duration and extent of the conduct where the use of the trust account for personal transactions was extensive and had continued for a long time.
- (b) The respondent knew that he was breaching the Act and Regulations. He had been disciplined previously for identical breaches and was found to have ignored his obligations. Those obligations had previously been made clear to him.
- (c) The respondent had been the subject of eight previous findings of unsatisfactory conduct between July 2009 and March 2016.

[9] The applicant noted a mitigating feature in that the breaches did not involve dishonesty and did not cause loss to clients.

[10] Counsel for the respondent submitted that the fundamental issue in this case was that there was no misuse of clients' funds or any detrimental effect on clients directly or indirectly. These matters were significant in considering the public interest as opposed to the interests of the profession as a whole.

[11] Counsel for the respondent submitted that a penalty of a censure, fine and an undertaking to provide independent trust account reporting on a monthly basis would be sufficient to achieve the purposes of the Tribunal's disciplinary function. He

submitted that the following factors did not require removal of the respondent from practice by suspension as argued for by the applicant:

- (a) The public interest did not require his removal from practice.
- (b) There was no failure to discharge professional duties to a client.
- (c) The respondent's conduct related to his own affairs carried out through the trust account.
- (d) Censure was particularly effective against a sole practitioner who relies on personal reputation to conduct business with other practitioners.²

Discussion and Decision

[12] Counsel for the applicant and the respondent have referred to the relevant authorities in respect of suspension orders and to authorities relevant to penalties involving a lesser sanction.³

[13] While the Tribunal has regard to the authorities as guidance, the disciplinary outcome for each case must be assessed on an individual basis.

[14] In reaching its decision on penalty as recorded in paragraph [3] above, the Tribunal decided against a period of suspension after hearing the submissions of the respondent's counsel particularly in respect of the fact that the respondent's breaches related to personal transactions and that he has engaged the services of an independent person to monitor his trust account monthly and to report to the Law Society.

[15] Counsel for the respondent argued that the respondent should not be punished twice for previous interventions. The respondent's previous disciplinary

² *Bhanabhai v Auckland District Law Society* [2009] NZAR 282 (CA) at 68.

³ *Auckland Standards Committee No. 5 of the New Zealand Law Society v Patel* [2014] NZLCDT 67; *Auckland Standards Committee 2 v Hollins* [2014] NZLCDT 66; *Auckland Standards Committee 4 of the New Zealand Law Society v Appleby* [2014] 34; *Wellington Standards Committee 2 of the New Zealand Law Society v Jones* [2014] NZLCDT 52; *Auckland Standards Committee 5 v Yoo* [2016] NZLCDT 35.

findings are relevant because they relate to conduct that is repetitive and, in the main, identical to his conduct in this case.⁴

[16] The Costs of the Tribunal are now fixed at \$4,804.00.

[17] At the conclusion of the hearing, the Tribunal censured the respondent with the following words.

Mr Bogiatto

You are censured in the strongest terms. As an experienced lawyer, you understand that the holding of a trust account, with the privileges and responsibilities that entails is one of the fundamentals underpinning legal practice.

In this instance your failures in respect of your trust account relate significantly to your use of it for personal transactions. This is a repeat of identical conduct that occurred in 2011/12. That conduct is a matter of serious concern which indicates to the Tribunal a cavalier attitude to compliance with your responsibilities.

You must know that you have avoided suspension by a fine margin. Be quite clear. There will be little, if any, tolerance for further transgressions.

DATED at AUCKLAND this 22nd day of January 2018

BJ Kendall
Chairperson

⁴ *Wellington Standards Committee 2 v Morahan* [2017] NZLCDT 34.