

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 6

LCDT 030/17

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 5**

Applicant

AND

BOHsoon (BRENT) KANG

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms F Freeman

Mr C Lucas

Mr G McKenzie

Ms C Rowe

HEARING at Specialist Courts and Tribunals Centre, Auckland

DATE 5 March 2018

DATE OF DECISION 19 March 2018

COUNSEL

Ms K Lawson-Bradshaw for the applicant

Mr P Napier for the respondent

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

[1] The respondent is charged with one charge of misconduct pursuant to 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 Regulations made under the Act that apply to the respondent in the provision of regulated services.

[2] He is charged in the alternative with negligence or incompetence in his professional capacity to such a degree or frequency as to reflect on his fitness to practice or as to bring his profession into disrepute pursuant to s 241(c) of the Act. As a further alternative, he is charged with unsatisfactory conduct.

Background

[3] The respondent's firm's trust account was reviewed by the New Zealand Law Society Inspectorate (the Inspectorate) in 2008, 2012 and 2016. Following each inspection, the respondent was notified of breaches of the Act and Regulations that had been identified by the Inspectorate and was required to remedy the shortcomings in his trust account practices.

[4] A further inspection occurred on 31 January 2017 and 1 February 2017. The following deficiencies in the respondent's trust accounting records and practices were identified:

- (a) Failure to rectify an imbalance between his trust accounts and trust account bank balance.
- (b) Failure to reconcile his trust bank account balances with his trust account ledgers.
- (c) Failure to report to clients.

- (d) Failures to report to the New Zealand Law Society.
- (e) Failure to address unpresented cheques.

Issues with the monthly reconciliation

[5] An imbalance of \$281.04 was first identified by the Inspectorate in July 2008. That imbalance remained unrectified as at 31 January 2017. The respondent had been advised to rectify the imbalance on subsequent occasions in November 2012 and March 2016. A further imbalance of 0.9 cents was raised in the review report of January 2017.

Failure to report to clients

[6] As at 17 January 2017, the respondent's IBD trust account had seven dormant balances which had been so since 30 November 2011. The respondent had not provided statements to his clients about the monies despite the matter having been raised with him in December 2008, November 2012 and again in March 2016. His failure to do so was a breach of s 111 of the Act and of Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. In addition, there was a long list of small credit balances which related to agency charges for engaging an agent in 2005 and 2006 to undertake land dealings prior to the commencement of e-dealing with LandOnline. The respondent has now paid those stale balances to Inland Revenue as advised by the Inspectorate.

Failure to report to the New Zealand Law Society

[7] The applicant acknowledges that it has not specifically charged the respondent with this conduct. Counsel for the respondent has submitted that, in that event, the conduct should not be considered because it has not been fully investigated and the respondent has not been called on to respond.

Failure to address unrepresented cheques

[8] This issue relates to two historical stale cheques for amounts of \$180.00 and \$178.89. The applicant accepts that this issue does not breach any specific section, rule or regulation. The applicant included it as a particular of the alternative charges of negligence or unsatisfactory conduct. The respondent advises that the issue has been remedied with the assistance of professional help.

[9] The respondent has admitted the particulars alleged against him. He disputes that he is guilty of professional misconduct. He has admitted that he is guilty of unsatisfactory conduct.

[10] The respondent has sworn two affidavits in support of his defence to the charges. The first is dated 6 October 2017. The respondent filed an updating affidavit sworn on 2 March 2018. The essential elements of the respondent's evidence in defence are:

- (a) He did not receive adequate training on how to operate the LAWbase software relating to his practice trust account.
- (b) He did not know how to remedy the errors.
- (c) He asked for help from the Inspectorate on how to remedy the errors but did not receive the necessary assistance.
- (d) That he engaged Ms Postlewaight to assist him rectify the imbalances without success.
- (e) That there was no wilful intent on his part to be in breach of the Act, rules or regulations.

[11] The respondent deposed in his affidavit of 2 March 2018 that he has resolved the following issues since the charges were laid.

- (a) Imbalances of \$281.04 and \$0.09 with the assistance of LexisNexis.

- (b) Stale or unrepresented cheques.
- (c) Reporting to his clients on dormant balances annually.
- (d) Keeping accurate records.

[12] He has now also paid Inland Revenue \$4,174.09 to clear the agency balances referred to in para [6].

[13] The respondent was cross-examined by counsel for the applicant. When asked about keeping up to date with trust accounting regulations, the respondent admitted that he was not familiar with all the regulations at the time and was in need of good familiarisation.

[14] As to the imbalances, his response to questions was that he went to Ms Postlewaight on the recommendation of the Inspectorate because he could not fix the problem himself. In the context of saying that he forgot about the balances he said that he did not want to shut his eyes but waited for Ms Postlewaight to come back to him. He did not contact anyone else expecting that she would come back to him and because he thought that she was the only person who could help. He has renewed his maintenance contract with LexisNexis and that has resulted in the problem being resolved.

[15] The respondent did say that the cost quoted by Ms Postlewaight to look into the problem was alarming to him. He was somewhat lulled into inactivity by her comment to the Inspectorate that the problem was minor.

[16] In respect of other matters, he accepted that he did not focus on them seriously enough, but as a sole practitioner, he concentrated on managing the day to day business of his practice. He said that he has now realised the extent of his obligations.

[17] The Tribunal found the respondent to be a candid and truthful witness.

Discussion

[18] The applicant submitted that the most serious conduct of the respondent is the continued imbalance present in his trust account when regard is had to the following:

- (a) The imbalance has been ongoing since 2008.
- (b) The imbalance was repeatedly brought to the respondent's attention between 2008 and 2017.
- (c) The respondent did not take sufficient steps to ensure the imbalance was remedied having at one stage declined the services of engaging Ms Postlewaight because of the expense of employing her.
- (d) The respondent attempted to shift blame for his lack of action onto the Inspectorate.

[19] The applicant's submission was that there has been a deliberate departure from accepted standards and a finding of wilful or reckless misconduct by the Tribunal was both available and appropriate.

[20] Counsel for the respondent submitted that the Tribunal should make a finding of unsatisfactory conduct. He argued that the following points should be taken into consideration:

- (a) The respondent was poorly trained in using LAWbase, adopted a practice of using manual and electronic accounting systems which led to the creation of an embedded ledger imbalance which appeared to defy rectification.
- (b) The respondent engaged Ms Postlewaight to assist him in rectifying the ledger imbalance.
- (c) There was dialogue between the respondent, Ms Postlewaight and the Inspectorate intermittently from August 2008 to May 2009 where

Ms Postlewaight advised that she had addressed other balances but could not isolate or fix the ledger imbalance of \$281.04. Thereafter the remedial dialogue ended.

- (d) The respondent has shown remorse and apologised to the Committee for his failure to rectify the issues within the timeframe set out by the Inspectorate.
- (e) The respondent's breaches are more historical in nature than continual breaches in that there are no more breaches apart from the specified imbalances of \$281.04 and \$0.09.

[21] Counsel for the respondent emphasised that:

- (a) There was no deliberate contravention of the Act and Regulations.
- (b) There was no reckless disregard of the professional rules or proceeding with reckless indifference as to whether this was the case.
- (c) The respondent tried to resolve the matters through engaging with Ms Postlewaight and the Inspectorate.
- (d) There has not been a widespread or total failure of the respondent's trust accounting systems.
- (e) There has been no misappropriation or loss of client money.
- (f) There has been no dishonesty by the respondent.

[22] Counsel for the applicant referred the Tribunal to the decisions in *Auckland Standards Committee 5 v Yoo*¹ and *Auckland Standards Committee 2 v Bogiatto*² where the practitioners were the subject of charges relating to the management and use of the trust account.

¹ *Auckland Standards Committee 5 v Yoo* [2016] NZLCDT 35.

² *Auckland Standards Committee 2 v Bogiatto* [2017] NZLCDT 27.

[23] Counsel for the respondent, in addition, referred to the Tribunal's decisions in *Auckland Standards Committee 5 v Holmes*³, and *Otago Standards Committee 1 v Stewart*⁴.

[24] In this case, the Tribunal considered that the decision in *Yoo*, more closely related to the facts of the respondent's failures. It was persuaded by the submissions of the respondent's counsel, and, by the honesty and candour with which the respondent presented himself, that his failures were less serious than those instanced against Mr Yoo whose conduct was found to equate to low level negligence.

[25] The Tribunal therefore made a finding of unsatisfactory conduct against the respondent, Mr Kang.

[26] By way of assistance, the Tribunal then indicated its thinking in respect of penalty:

- (a) A fine of \$5,000.00.
- (b) The respondent to pay the costs of the Law Society in the usual way.
- (c) The respondent refund to the Law Society the Tribunal's costs in the usual way.
- (d) The respondent undertake a Trust Account Supervisor Refresher Course as soon as practicable but within the next 12 months.

[27] Counsel for the respondent indicated the suggested penalties were accepted.

[28] Counsel for the applicant required time to take instructions. Acceptance of the proposed orders was subsequently indicated by memorandum.

[29] Counsel for the respondent subsequently submitted that it was relevant that the respondent accepted from the outset that his conduct was unsatisfactory. He

³ *Auckland Standards Committee 5 v Holmes* [2011] NZLCDT 31.

⁴ *Otago Standards Committee 1 v Stewart* [2016] NZLCDT 28.

submitted that therefore the Committee's prosecution of the respondent was unnecessary and that in the circumstances this should bear on the proportion of costs to be reimbursed.

[30] The applicant's response is that the fact the charges were proven at the level of unsatisfactory conduct does not mean that the applicant's reasonable costs should not be ordered.

[31] The Tribunal determines that the respondent pay the Law Society's costs as presented.

Orders

[32] The Tribunal makes the following penalty orders:

- (a) Fine in the sum of \$5,000.
- (b) The respondent to pay the Law Society costs in the sum of \$13,067.20.
- (c) The Law Society to pay the Tribunal costs which are fixed at \$3,232.00.
- (d) The respondent to refund in full to the Law Society the Tribunal costs in the sum of \$3,232.00.
- (e) The respondent to undertake a Trust Account Supervisor Refresher Course as soon as practicable but within the next 12 months.

DATED at AUCKLAND this 19th day of March 2018

BJ Kendall
Chairperson