NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 12
LCDT 030/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 2** Applicant
AND	**ROHINEET SHARMA** of Auckland, Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr S Grieve QC
Ms C Rowe
Mr W Smith
Mr I Willliams

HELD at Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 1 December 2014 and 27 February 2015

DATE OF DECISION 23 April 2015

APPEARANCES
Mr R McCoubrey for the Standards Committee
Mr A Gilchrist for the Practitioner

PENALTY DECISION OF NEW ZEALAND
LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] In an affidavit sworn on 7 November 2014 the practitioner Mr Sharma admitted one charge of misconduct and the facts giving rise to that charge laid by the Auckland Standards Committee No 2. However the Standards Committee and Mr Sharma differ as to whether the misconduct was intentional or inadvertent. A hearing as to these disputed facts was required, this reserved decision arises from that hearing. Reasons for the decision to strike the practitioner from the Roll also form part of this decision.

[2] The hearing scheduled for December was adjourned because the practitioner had been hospitalised. The Tribunal took the opportunity of requesting further evidence be filed about the circumstances of the Westpac loan advance which was central to the issue to be determined. That was available, as were the two witnesses, for the February hearing.

[3] The misconduct charge arose from the practitioner's purchase of a commercial property at 29 Queens Road, Panmure, Auckland, for which Westpac bank required a first mortgage to be registered in its favour. To facilitate this, and without authority, the practitioner discharged the mortgage to BNZ over his own residential property, submitted a false solicitor's certificate to Westpac, and filed a false discharge of mortgage certificate with Landonline to effect the discharge of the mortgage to BNZ.

Summary of Background

[4] The practitioner was at the time of offending a barrister and solicitor practising on his own account for Sharma Legal in Panmure, Auckland.

[5] In May 2012 the practitioner wished to purchase a commercial building at 29 Queens Road, Panmure with the intention of relocating his office there. The property was to be auctioned on 10 May 2012. In order to bid at auction the practitioner needed to secure finance.

[6] On or around 4 May 2012 the practitioner approached Ms M, a residential banking consultant (dealing with home loans) who at that time worked for the local branch of Westpac. The practitioner knew Ms M because he was a customer of Westpac, and they had dealt with each other in relation to residential lending applications for clients of Sharma Legal

[7] Ms M's evidence[1] is that she was never authorised or sufficiently experienced to deal with commercial lending and her Credit Approval Limit ("CAL") restricted her to residential lending. However she did provide the practitioner with a Customer Needs Review ("CNR") form to complete for his loan application when he enquired about his intentions to purchase the commercial property. Ms M later referred the practitioner's application to Ms C, Business Manager associated with the branch, who dealt with all commercial lending for the branch. Both Ms M and Ms C gave evidence at the hearing.

[8] Despite the practitioner's various assertions that it was substantially Westpac's, and specifically Ms M's, fault that he ended up in his current predicament, there is no evidence to show that Ms M's involvement was anything other than introducing a regular client to the appropriate banker to deal with his commercial enquiry. That person was Ms C, and she appears to have dealt with the matter in accordance with normal Westpac policy despite – as it turns out – having been misled by the practitioner. Ms C described the practitioner's application as "nothing out of the ordinary" and that the Bank had not been incompetent as the practitioner alleged. Westpac had not changed its mind about lending to the practitioner as he alleged.

[9] The practitioner told the Tribunal that he did not understand how banks work, and that he believed Ms M when (he said) she told him without further enquiry that he would have no problem accessing finance from Westpac to purchase the commercial property he had pointed to across the road from the bank. Even if we accept that Ms M would have made such a comment (which we do not and she denies) his was not a credible statement from a practitioner for whom property and lending were a significant part of his business.

[1] Affidavit of Ms M sworn 22 December 2014.

[10] The practitioner's evidence[2] is that he made it clear in his first enquiry with Ms M that any borrowings for the commercial building would have to be on a "stand alone" basis and have nothing to do with his residential property at Codrington Crescent, Mission Bay, Auckland. But the evidence from written exchanges between the practitioner and Ms C is that Westpac always required a first mortgage over the Codrington Crescent property for 100% finance to purchase commercial property.

[11] The practitioner's residential property at Codrington Crescent was mortgaged to BNZ for $2.5 million. Nevertheless, when the practitioner completed the relevant Westpac CNR form dated 4 May 2012, he disclosed borrowings from BNZ as $400,000 only. The practitioner's explanation for this discrepancy was that he did not have all the necessary detail when he started filling out the CNR form, and that Ms M had instructed him to bring in all his bank statements and other documents and that the form could be completed later. But he signed the form with the $400,000 figure in it.

[12] The practitioner told the Tribunal that Ms M knew the full extent of his borrowings was $2.5 million. As we have already said, Ms M's evidence was that she could not and did not have any involvement in the commercial lending matter, and that it was Ms C who had authority for commercial matters. For her part Ms C told the Tribunal that, at the time she was dealing with the practitioner's application, she knew only of a $400,000 liability to BNZ. She learned much later that his indebtedness was $2.5 million.

[13] In any event the practitioner says he formed the (clearly mistaken) conclusion from his discussions with Westpac in May 2012 that he would be able to access a confirmed stand alone lending arrangement with Westpac, and on that basis he entered into an unconditional agreement to purchase the commercial property at 29 Queens Road, Panmure for $490,000 after the auction on 10 May 2012.

[14] On 22 May 2012 the practitioner emailed Ms C at Westpac advising her that he had entered into an unconditional agreement on the Queens Road property, and requested borrowings of $490,000 to meet a settlement date of 30 June 2012. His 22 May email said:

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[2] Paragraph 16, Affidavit of Rohineet Sharma 7 November 2014.

> "Attached is copy of the sale and purchase agreement signed yesterday. You will note that the agreement is unconditional (silly me).
>
> Yes I wish to borrow $490k for settlement that is on 30 June. Deposit of $49k is required by this Friday.
>
> Your loan proposal – is that the only way possible? Can we do 1005 (sic) interest only? What is the best interest rate you can give me?
>
> Thank you for your time. No pressure!!
>
> Cheers
>
> Rohineet."

[15] The practitioner wanted to complete the purchase of the property using his wife's and his incomes, and the security of the new property to be purchased, but Westpac told him they required a first mortgage to be registered against their residential property in its favour before granting the practitioner a loan for the commercial property.

[16] On 28 May 2012 the practitioner advised Ms C that he would "proceed with Westpac" and that he would pay off BNZ from his own funds and that the only funds required from Westpac would be $490,000 to purchase the building.

[17] On 30 May 2012 Westpac instructed Sharma Legal requiring a new first mortgage over 49 Codrington Crescent, with a priority limit of $1,090,000 plus interest.

[18] To effect Westpac's loan conditions, on 31 May 2012, the practitioner discharged his own mortgage to BNZ over the property without authority from BNZ. This was achieved by:

1. Submitting a false solicitor's certificate from Sharma Legal with Westpac, arranging for a first mortgage to be registered in Westpac's favour; and

2. Filing on 1 June 2012 a false discharge of mortgage certificate with Landonline to effect the discharge of the BNZ mortgage; and

3. Registering the Westpac mortgage with Landonline.

[19] The above transactions required the practitioner to complete a number of "Mortgagee Certifications" on-line by proactively ticking the appropriate boxes certifying legal capacity, authority, identity, compliance with statutory provisions, and truth of certifications. In order to register on Landonline the practitioner is required to certify at least twice for each registration that he had the required authority from (in this case) the mortgagee.

[20] In his Response to Charge[3] Particular 5 (discharging the mortgage without authority), the practitioner says that "*whilst he discharged the mortgage to BNZ over the property without authority from BNZ he did such inadvertently without intention to mislead or deceive*".

[21] In response to Particular 6 of the Charge (steps taken to discharge the mortgage), the practitioner "*whilst accepting that a solicitor's certificate that was false was provided to Westpac he did not believe that certificate to be false at the time that the certificate was given, and that whilst accepting that a false discharge of mortgage certificate was filed with Landonline he did not believe that such to be a false certificate at the time that it was given".*

[22] On 29 June 2012 the practitioner and his wife completed settlement of the purchase of Queens Road, Panmure for a total price of $490,000. It can be seen that this was over four weeks after the supposedly inadvertent discharge of the mortgage.

[23] From June 2012 Mr and Mrs Sharma continued to credit the required amount monthly to their BNZ loan account to meet the interest instalments on their loan to BNZ. The Bank was accordingly not alerted to the fact that the loan account was out of order. In addition three lump sum payments were made by way of debt reduction on 11 December 2013 ($30,000), 12 December 2013 ($40,000) and 2 January 2014 ($23,500). Mr Sharma submits that this demonstrated his good intentions and lack of knowledge of the discharge. The Standards Committee, and the BNZ, suggest that this can also be seen as a calculated means of avoiding detection.

[24] On or around 3 February 2014, BNZ discovered that the Sharma's' mortgage had been discharged without BNZ authority; and that the borrowers had granted new

[3] Response to Charge against Practitioner dated 7 October 2014.

mortgage over the title to the Codrington Crescent property in favour of Westpac New Zealand Ltd. To protect its position the bank immediately lodged a caveat over the title of the Codrington Crescent property; and subsequently cancelled the loan contracts and demanded repayment of the full amount of indebtedness to BNZ. The practitioner has repaid all amounts owing to BNZ. While the practitioner's evidence is that he did not set out to, and did not gain anything from the transactions, it is certainly the case that BNZ was left without security for around 19 months.

[25] As a result of the practitioner's actions, the Registrar-General of Land suspended Mr Sharma's ability to certify land title transactions until after the matter had been dealt with the Tribunal. Since that time the practitioner has been unable to provide full conveyancing services to any clients directly.

[26] It is a disturbing feature of the practitioner's misconduct that in addition to attempting to excuse his actions as an inadvertent error, he has gone further and blamed the mortgagee, when there is no evidence that Westpac should bear any responsibility for the situation the practitioner finds himself in.

Credibility Findings

[27] The practitioner has given, at different times, various reasons for his having discharged the BNZ mortgage without authority. At one point he referred to:

> "… a state of extreme panic and anxiety and in a rush to complete matters and without fully thinking about what I was doing I discharged the BNZ mortgage and registered the Westpac mortgage."[4]

[28] Later in the same affidavit[5] he said:

> "I have considered on many occasions how did the present circumstances come about. I am a lawyer and not unintelligent. I would not have deliberately put myself in this position knowing well that if I did then the matter would come to light within a few weeks. I could easily have refinanced with another institution and over another property. I also had the ability to go to another Bank and I did not need to get this finance from Westpac."

[4] Affidavit Rohineet Sharma, 7 November 2014, at [28].
[5] At [32] of affidavit.

[29] He went on to describe himself as "devastated" when the error was brought to his attention on 3 February 2014. He further describes himself as "stunned and shocked".[6]

[30] Submissions on behalf of Mr Sharma from his counsel submitted that although the documents filed were false they were not known to be false by the practitioner at that time. That submission overlooks the patently false declaration to Westpac in the CNR form, namely that the only indebtedness in respect of his residential property was $400,000. That is a false declaration which Mr Sharma has also failed to explain and which significantly undermines his credibility.

[31] It is also difficult to understand how there can be such an ingredient of panic or pressure when more than four weeks lapsed between the obtaining of finance and discharge of the mortgage and settlement of the new purchase. It simply defies credibility to suggest that the practitioner's "inadvertence" in relation to a discharge of a mortgage owed by him personally, with such very large amount outstanding, ($2.5 million) could continue over this period.

[32] Mr Sharma is an experienced conveyancing practitioner. In undertaking the legal work for a purchase on his own behalf he ought to have been doubly careful.

[33] In oral evidence he was asked a number of times to explain how this "error" could possibly have arisen. He was simply unable to provide a rational explanation. In the end we were in agreement with the Registrar of Land who said the following when removing Mr Sharma's e-dealing authority:

> "Mr Sharma maintains he made an error in discharging the mortgage. In the absence of a clear explanation as to how this came about it is difficult to understand how this could have occurred."

[34] The Registrar, Mr Muir, went on to discuss the integrity of the land title system and its reliance upon lawyers diligently performing their obligations when certifying land title transactions. These comments confirm the seriousness of the misconduct insofar as it affects the reputation of the profession as a whole and the integrity of the land transfer system in this country.

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[6] Paragraph 15 of affidavit.

[35] Further credibility questions were raised by the differences in Mr Sharma's evidence from that of the two witnesses from Westpac. We prefer the evidence of Ms C and Ms M respectively to that of the practitioner. Although this transaction took place some time ago, their recollections accorded with the documentary evidence including the email referred to in [14] above. A further example is that their evidence as to lack of knowledge to the BNZ $2.5 million mortgage is supported by the document (CNR) which contained the false declaration made by Mr Sharma.

[36] The continuation of payments under the BNZ (discharged) mortgage, as well as principal repayments, allowed the true situation to remain undetected by the bank. We do not find it credible that these payments were a continuation of the practitioner's "inadvertence", but rather that the more likely inference is that they were an attempt to avoid or delay discovery of the discharge.

[37] We reached the view, on considering the evidence as a whole, that the Standards Committee had established on the balance of probabilities (having regard to the gravity of the allegations) that the discharge of this mortgage was deliberate and not an inadvertent error as described by the practitioner. We did not accept his assertion that he was being candid with the Tribunal; to the contrary we concluded that in a number of crucial respects his evidence was simply not credible.

[38] That finding elevates the misconduct to conduct involving dishonesty and is very serious misconduct indeed.

Principles in Penalty Decisions

[39] The purposes of disciplinary sanctions in a professional setting have been well discussed and can be summarised by reference to the following dictum in *Daniels*:[7]

> "[22] It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which includes "the protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases."

[40] It was *Daniels*[8] also which reminds the Tribunal that "the least restrictive outcome" principle ought to apply in disciplinary proceedings. Dating back to *Bolton*[9]

[7] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

the unquestioned approach to a finding of dishonesty in a practitioner has been strike-off, unless there are some unusual circumstances which mitigate against this. The references in *Bolton* to performance of professional duties *"… with integrity, probity and complete trustworthiness …*" are well known.[10]

[41] It is submitted by the Standards Committee that the practitioner's approach to his admitted conduct, namely that it was unintentional and in addition seeking to blame Westpac for placing him in a position of stress and pressure, demonstrate a lack of insight into his behaviour. It is submitted for the Standards Committee that this conduct might give the Tribunal pause for thought about the practitioner continuing in the profession.

[42] We were reminded that the conduct in issue involved filing two false documents and that multiple steps were required in submitting the false documents for registration.

[43] It is not in dispute that the online registration system requires lawyers to act with extreme care and absolute integrity.

[44] We accept the submission that the practitioner has failed on both counts in relation to this discharge of mortgage and that that behaviour is aggravated by reason of the fact that it was a dealing for his personal benefit, (in that it allowed the purchase by him of a commercial building.)

[45] Further aggravating features are the three adverse disciplinary findings against the practitioner since 2008, namely two findings of unsatisfactory conduct and one of conduct unbecoming. It is accepted that none of these matters are at the level of seriousness as the present matter.

[46] In mitigation counsel for the practitioner raises a number of matters. Firstly in that having his ability to certify land title transactions removed, the practitioner has suffered a huge impact on his practice, requiring another practitioner to certify conveyancing transactions for him. Counsel pointed to the fact that this in itself contained an element of public protection.

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[8] See footnote 7.
[9] *Bolton v Law Society* [1994] 2 All ER 486.
[10] See footnote 2 at page 490.

[47] The practitioner has reportedly suffered extreme stress and indeed suffered a heart attack last year. His family life and his income have been impacted.

[48] Counsel further submitted that the documents were not known by the practitioner to be false at the time. We have rejected this argument and in particular in relation to the false declaration to Westpac concerning his BNZ borrowings, which were clearly known to be false by the practitioner at the time the declaration was made. The submission was also made that the public was not at risk from the practitioner, however we consider that this submission must have been prefaced on the basis that the Tribunal would find an inadvertent rather than deliberate act by the practitioner. We understood Mr Gilchrist to concede that strike-off was a proper response if we found his client's actions had been deliberate.

[49] The practitioner must face the consequences of approaching this charge by providing narratives which the Tribunal has found unbelievable. This certainly deprives him of the opportunity of claiming insight, or capacity for rehabilitation which might have made a penalty of suspension at least able to be entertained.

[50] Finally, a number of personal and professional testimonials are provided from colleagues of the practitioner which attest to his positive dealings in practice, his personal integrity and community activities. While we accept the genuineness of the testimonials, it has long been recognised that in a disciplinary process which must prioritise public protection and the protection of the profession's reputation, that such factors cannot be taken to outweigh the overriding need for conduct of this sort to be protected against.

[51] The Tribunal, as a panel of five, unanimously found that no penalty short of removing of the practitioner from the roll of Barristers and Solicitors would properly and proportionately address the misconduct in this case. The practitioner was advised of this in the oral decision of 27 February and consequential orders made at that time.

[52] The Standards Committee costs are noted at $15,097.89 and the s 257 costs are certified at $5,384.

DATED at AUCKLAND this 23rd day of April 2015

Judge D F Clarkson
Chair