

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2012] NZLCDT 2

LCDT 021/11

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006 and the Law Practitioners
Act 1982

AND

IN THE MATTER

of **MARCUS ARTHUR
MACDONALD**, former practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Ms C Rowe

Mr P Shaw

Mr B Stanaway

HEARING at AUCKLAND on 21 February 2012

APPEARANCES

Mr M Treleaven for the Applicant

Mr A Witten-Hannah for the Respondent

ORAL DECISION OF THE NEW ZEALAND
LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

- [1] The Tribunal today was initially considering two charges faced by Marcus Macdonald. At the outset of the hearing Mr Treleaven for the Standards Committee 3 which brings the charges has sought leave to withdraw charge 2 particularly to recognise the early acknowledgement of charge 1 by the Practitioner. In the circumstances I am satisfied that Count 1 adequately reflects the culpability involved and that Count 2 adds little to the case overall. Accordingly on behalf of the Tribunal, I formally give leave to withdraw charge 2 and the Practitioners acknowledgement of charge 1 is recorded.
- [2] Counsel have worked together on this matter throughout this process and indeed throughout the entire investigative process of the offending which has led to the facing of this charge by Mr Macdonald. The practitioner has been extremely cooperative with authorities and as a continuation of that counsel have productively provided the tribunal with an agreed statement of facts which provide a background to the charge.
- [3] The charge is that having been convicted of an offence punishable by imprisonment, which conviction reflects on fitness to practice or tends to bring the profession into disrepute, that Mr Macdonald is thereby guilty of misconduct.
- [4] We simply propose to read into this decision the agreed summary of facts in its entirety and say little more about the matter given that Mr Macdonald has already served a reasonably lengthy term of imprisonment.

Summary of Facts

1. *Mr MacDonald (sic) a former practitioner has pleaded guilty to a disciplinary charge pursuant to section 241 of the Lawyers and Conveyancers Act 2006 of having being convicted of an offence punishable by imprisonment which conviction reflects on his fitness to practise or tends to bring the profession into disrepute.*
2. *The criminal convictions related to guilty pleas he entered to six charges in the Auckland District Court, two against section 220 of the Crimes Act 1961, three against section 58 of the Securities Act 1978 and one against section 41 of the Financial Reporting Act 1993. He was sentenced to two years and 3 months imprisonment on the Crimes Act charges and to a*

concurrent 1 year and 6 months imprisonment on the Securities Act and Financial Reporting Act charges.

3. *The prosecutions were brought by the Crown on behalf of both the Serious Fraud Office and the Ministry of Economic Development. Mr MacDonald's (sic) offending arose out of his role as a director of Five Star Finance Group. Mr MacDonald (sic) was charged with three other directors.*
4. *The first Serious Fraud Office conviction was that between 1 March 2007 and 30 March 2007 Mr MacDonald (sic) together with other directors had control over money secured by Five Star Consumer Finance Limited debenture stock on terms or in circumstances that he knew required him to deal with the money, in accordance with the requirements of a Debenture Trust Deed and he intentionally dealt with advances totalling \$14,221,000 otherwise than in accordance with those requirements (bundle p162).*
5. *The second Serious Fraud Office conviction was that between 1 April 2003 and 30 March 2007 Mr MacDonald (sic) together with other directors had control over money secured by Five Star Consumer Finance Limited debenture stock on terms or in circumstances that he knew required him to deal with the money, in accordance with the requirements of a Debenture Trust Deed and he intentionally dealt with advances totalling \$35,905,278.51 otherwise than in accordance with those requirements (p163).*
6. *Mr MacDonald (sic) breached section 220 of the Crimes Act by arranging and approving unauthorized related party loans, with knowledge that these loans violated Five Star Consumer Finance's obligations under the Trust Deed. The bulk of the lending described as commercial advances was to entities and people associated with the Five Star Consumer Finance directors. The recipients of the loans were used by the defendants to disguise the true nature of the loans. Had the true nature of the loans been known they would have required trustee approval prior to the loans being made. No approval was sought or given (p170).*
7. *The Securities Act convictions were for distributing an advertisement including untrue statements and signing a registered prospectus which was distributed including untrue statements (p189 & 190). The untrue statements in the advertisement and registered prospectus were:*
 - 7.1 *That Five Star Consumer Finance Ltd was engaged in small loans to retail customers for the purposes of acquiring consumer goods and durables, which omitted a material particular, namely that Five Star Consumer Finance Ltd was engaged in a significant number of comparatively large "commercial" loans.*
 - 7.2 *That Five Star Consumer Finance Ltd was engaged in commercial loans for the purchase of equipment to be used for commercial purposes which omitted a material particular, namely that Five Star Consumer Finance Ltd was engaged in "commercial" loans to related parties for other purposes.*

- 7.3 *That Five Star Consumer Finance Ltd would/did not provide credit or advance loans other than in accordance with good commercial practice and internal credit approval policies, where as that was untrue because it did, including inadequately secured and/or non commercial related third party transactions.*
8. *The Financial Reporting Act conviction was for authorizing the making of a statement in a document required by the Financial Reporting Act 1993 that was false or misleading in a material particular, knowing the statement to be false or misleading (p192). The false or misleading statements in the registered prospectus were:*
- 8.1 *That Five Star Consumer Finance Ltd was engaged in related party transactions not disclosed in the financial statements.*
- 8.2 *That Five Star Consumer Finance Ltd would/did provide credit or advance loans other than in accordance with good commercial practice and internal credit approval policies, whereas that was untrue because it did, including inadequately secured and/or non commercial related party transactions.*
- 8.2 *That Five Star Consumer Finance Ltd monitored its liquidity cash position on a continuous basis and plans its operating activities to ensure a balanced liquidity position, whereas they were engaging in "commercial loans" with inadequate security which put their liquidity at risk.*
9. *Five Star Consumer Finance Limited was placed into receivership on 29 August 2007 owing approximately \$54.429 million to 2,300 secure debenture investors. As at 14 December 2009, debenture investors had received 22.5% of their outstanding investments, with the receivers estimating that they could receive a further 2.5%. Total losses to investors are approximately \$35 million (p183).*
10. *Mr Macdonald surrendered his practising certificate in October 2010 at around the time he pleaded guilty to the criminal charges. He was adjudicated bankrupt in the Auckland High Court on 23 December 2010.*

[5] Quite clearly the offending is very serious and the consequences to the investors in the finance company which failed were horrendous and their concerns and needs were addressed in the sentencing in respect of the offending by His Honour Judge Joyce QC. So there is really little this Tribunal could add about the nature of the offending itself. In addition to the agreed statement of facts, orders as to strike off are consented to by the practitioner and costs have been agreed and already paid in respect of the Standards Committee investigation and prosecution.

[6] The only matter which remains for the Tribunal to comment is to endorse the fact that these charges are so serious that strike off was an inevitable consequence

and so has been properly consented to by the practitioner. The charges are so serious that indeed no other consequence would have properly reflected the seriousness of this charge and its background.

- [7] The final matter to be considered is the Standards Committee's request for a reimbursement to them of the mandatory section 257 in respect of the Tribunal's own costs which are in the order of \$3,000-\$4,000 and will be the subject of a second minute specifying the costs to be paid by the Standards Committee. Given that Mr Macdonald is still bankrupt and clearly has lost considerably as a result of the offending already and is certainly not in a strong financial position such as would allow us to order complete reimbursement to the Standards Committee of the Tribunal's costs, we consider that only a contribution be ordered in this case and we will incorporate that in the terms of the orders.

Orders

- [8] Counsel has indicated the contribution the Tribunal had in mind is also consented to, thus the Tribunal makes the following orders by consent:
- (a) That the Practitioner be struck off the roll pursuant to s. 242(1)(c) of the Lawyers and Conveyancers Act 2006;
 - (b) New Zealand Law Society to reimburse in respect of the costs of the hearing pursuant to section 257; the sum to be notified in due course;
 - (c) Pursuant to s.249 of the Act, Mr Macdonald is to reimburse the New Zealand Law Society a contribution towards those s.257 costs in the sum of \$1,000.00.

DATED at AUCKLAND this 1st day of March 2012

Judge D F Clarkson
Chair