

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 2

LCDT 001/15

IN THE MATTER

of the Lawyers and Conveyancers Act
2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 5**

Applicant

AND

**GANG CHEN, KNOWN AS
RICHARD CHEN**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr C Lucas

Mr G McKenzie

Ms C Rowe

Mr W Smith

HEARING at Auckland on 10 February 2015

APPEARANCES

Mr P Collins for the Standards Committee

Mr G Blanchard for the Practitioner

**ORAL DECISION OF NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL ON PENALTY**

[1] Having considered the matter the Tribunal is prepared to endorse the agreed level of penalty which is being proposed by the Standards Committee and your counsel but what I would like you to do is listen carefully to what I am now going to give which is some brief oral reasons for that endorsement and then I will conclude by making the orders including delivering the Censure that will be required.

[2] In this matter Mr Chen faces one Charge of Misconduct and he has admitted that Charge and the ten supporting particulars, from the outset of these proceedings.

[3] In addition, with the assistance of his counsel and counsel for the Standards Committee, the Tribunal has been invited to impose, after a finding of Misconduct, a series of penalties.

[4] Annexed as an Appendix to this oral decision, the full Charge and particulars; and as a second Appendix, the Consent Memorandum of counsel. That will set out all of the background facts.

[5] The actions taken by Mr Chen in accepting money which was expressed to be a gift and then in not paying it into the Trust account for some months were most unwise. Mr Collins fairly expressed them as “confused and panicked” rather than dishonest and we accept that that is the case and that is why we are prepared to endorse the penalty arrangement proposed.

[6] It does meet the standard of Misconduct and it has been acknowledged by Mr Chen as meeting Misconduct under the two grounds pleaded. In particular, we refer to the reckless breach of the Trust Account Rules and s 110 of the Lawyers and Conveyancers Act 2006 (“the Act”), which provide for the proper management of funds received from clients.

[7] We commend Mr Chen for his openness to the Standards Committee. He swore an affidavit in which he immediately accepted his misjudgment and took responsibility for his actions and it is clear that from the outset of receiving this money, having attempted to refuse it on a number of occasions from the client, that he was uncomfortable and aware that receiving the payment directly, caused him professional ethical difficulties and that level of awareness is important.

[8] Mr Chen submits to us that he is now much more acutely aware of the important issue of a conflict of interests in acting in legal transactions and furthermore, that he is clear that his professional relationships ought not to be confused with or cross over into personal relationships.

[9] The Tribunal is somewhat concerned to note that he had given a similar form of assurance some six years ago when he faced his first disciplinary charge but that was not brought forward to this level and we accept the submission made by his counsel, Mr Blanchard, that the effect of these disciplinary proceedings and the penalties that will be imposed upon him, have ensured that the lesson is now well learnt and he will be extremely cautious in future.

[10] The mitigating features are of course the immediate acceptance of responsibility. The action itself, although Misconduct, is not at the most serious end of Misconduct or indicative of any form of dishonesty or personal gain being sought. The practitioner has dealt responsibly with the complaint investigation and prosecution process and furthermore has repaid the \$5,000 received to the client some months ago, as we understand it.

[11] What remains now is for the Tribunal to deliver a formal Censure and then make the consequential orders. The Censure is under s 156(1)(b) of the Act.

[12] Mr Chen you are formally Censured for your actions. You acted unprofessionally and recklessly in breaching the Act and the Rules which govern the management of client funds. These Rules are at the very heart of professional practice because the public are entitled to confidence that a professional adviser will treat their affairs and their property with the utmost care and good faith. We are concerned that this action went unnoticed for many months, which raises issues about the level of your supervision as an employee, although we note the firm's

continued support for you. This Censure is further to operate as a final warning that if further conduct of this nature were to reoccur your status as a practitioner will be at risk.

[13] In addition to that Censure the Tribunal orders a fine of \$5,000 pursuant to s 242(1)(i) and a costs order pursuant to s 249 for the costs of the Law Society which are estimated to be \$14,750, subject to any final invoicing by counsel for the Standards Committee.

[14] In addition there will be an order pursuant to s 257 against the New Zealand Law Society for the Tribunal costs of hearing. These costs are certified at \$1,587.

[15] Pursuant to s 249, Mr Chen is to reimburse the New Zealand Law Society for the s 257 costs of the Tribunal.

DATED at AUCKLAND this 10th day of February 2015

Judge D F Clarkson
Chair

Charge

Auckland Standards Committee 5 hereby charges the practitioner with misconduct, under s.7(1)(a)(i) & (ii) of the Lawyers and Conveyancers Act 2006 (“the Act”).

The particulars of the charge are:

1. At all relevant times the practitioner:
 - (a) Was enrolled as a barrister and solicitor of the High Court of New Zealand;
 - (b) Held a current practising certificate; and
 - (c) Practised as an employed barrister and solicitor at the Auckland firm Short & Partners.
 2. During the period July to November 2012 he acted for the vendor and purchaser in the sale of a café business known as C M located at Takapuna, Auckland:
 - (a) Initially, concerning an agreement for sale and purchase of a business dated 12 July 2012 in which he acted for the vendor, C & C, and the purchaser G C and or nominee; and
 - (b) Subsequently, in the same transaction but in relation to a Deed of Sale of Shares dated September 2012, concerning the sale of shares in the company C & C, between the vendor of the shares, F Z, and the purchaser, G C.
- (“the transaction”)
3. On or about 3 September 2012, Messrs C and Z signed separate documents headed “conflict of interest client acknowledgement form” authorising the practitioner to act for them in the transaction.
 4. On 2 October 2012 the sum of \$392,000 was paid by the purchaser to the vendor for the purpose of completing the transaction. That payment was made through the trust account of Short & Partners and was facilitated by the practitioner.
 5. On 2 November 2012, Mr Z made a payment in the sum of \$5,000 to the practitioner as remuneration for his services in the transaction, in respect of which:
 - (a) The practitioner directed Mr Z to make the payment into a specified bank account;
 - (b) The specified bank account was an account held by a friend or associate of the practitioner named S F Q; and
 - (c) Mr Z made the payment of \$5,000 into the specified bank account.

(“the payment”)

6. Apart from the payment, Short & Partners did not receive a fee either from Mr Z or from the purchaser for the practitioner's attendances in the transaction.
7. On unknown dates, but in any event sometime after the payment:
 - (a) The practitioner's friend or associate, S F Q, paid the practitioner an amount equivalent to the payment in Chinese currency; and
 - (b) The practitioner withdrew \$5,000 from a personal bank account and kept that sum, in cash, in his desk at the offices of Short & Partners.
8. On 6 June 2013 the practitioner deposited the funds in the sum of \$5,000, described in paragraph 7(b) above, into the trust account of Short & Partners recorded against the trust ledger of G C with the description "*received from G C for contribution to purchase shares*".
9. On 16 September 2013:
 - (a) A partner at Short & Partners, issued a fee invoice to F Z and Y C, for "sale of shares in C & C", in the sum of \$5,000 inclusive of GST; and
 - (b) The funds held in the trust ledger of G C referred to in particular 8 above were identified as having been deposited against the wrong ledger and were journaled to the ledger for clients "Mr Z and Ms C" and were subsequently deducted in payment of the fee invoice.
10. In the circumstances of the transaction and the payment described in paragraphs 1–9 above:
 - (a) The payment was an advance payment of fees by Mr Z, in the absence of a fee invoice;
 - (b) Consequently, the receipt of the payment was subject to, and imposed duties on the practitioner with reference to:
 - (i) Section 110(1) of the Act;
 - (ii) Regulation 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008; and
 - (iii) Rule 9.3 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008;
 - (c) The effect of those provisions was that the practitioner had an obligation to ensure that the payment was promptly paid into the trust account of Short & Partners; and
 - (d) Instead, he facilitated the payment into the personal bank account of a friend or associate.

Consent Memorandum including Practitioner's admission of charge

May it please the Tribunal:

11. This memorandum is submitted to the Tribunal jointly on behalf of Auckland Standards Committee 5 and the practitioner, through their counsel. It is filed in conjunction with the disciplinary charge and a supporting affidavit on behalf of the Standards Committee.
12. The practitioner admits the charge, a copy of which is attached to this memorandum. In particular, the practitioner admits:
 - (a) The charge of misconduct under s.7(1)(a)(i) & (ii); and
 - (b) The particulars of the charge recited at paragraphs 1–10 inclusive.
13. The parties seek a hearing before the Tribunal at which time it is contemplated that the Tribunal would:
 - (a) Find the charge to be established on the basis of the admission and the supporting evidence on behalf of the Standards Committee; and
 - (b) Hear from counsel concerning penalty.
14. Counsel acknowledge the Tribunal's jurisdiction and authority to impose such penalty or penalties as it thinks fit. However, their joint submission is that the following penalties would be appropriate in light of the admission of the charge:
 - (a) That the practitioner be censured under s.156(1)(b);
 - (b) That he be ordered to pay a penalty of \$5,000 under s.242(1)(i); and
 - (c) That he be ordered to pay costs, under s.249, for the Law Society's costs incurred in the prosecution up to and including the hearing, and s.257 costs.
15. Counsel also record their acknowledgement that any application the practitioner might make in future to the New Zealand Law Society for his approval to practise on his own account, under s.30 of the Act and Rule 12 of the *Lawyers and Conveyancers Act (Lawyers: Practise Rules) Regulations 2008*, will be considered by the Law Society on its merits with the knowledge of this admission and any findings and orders by the Tribunal that may follow.