

**IN THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2011] NZLCDT 22

LCDT 020/10

IN THE MATTER

of the Lawyers and Conveyancers Act
2006

AND

IN THE MATTER

of Auckland Standards Committee No. 2

Applicant

And

WILLIAM GERALD KORVER of Auckland,
Solicitor

Respondent

TRIBUNAL

Chair

Mr D J Mackenzie

Members

Ms R Adams

Mr P Shaw

Mr W Smith

Mr C Rickit

HEARING in Auckland on 2 September 2011

REPRESENTATION

Mr J Katz QC and Mr M Treleaven for the Applicant

Ms A Challis and Ms K Harkess for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON PENALTY, COSTS, AND REASONS FOR DECLINING NAME SUPPRESSION

Introduction

[1] These proceedings arose from charges originally laid against Mr Korver in September 2010 in relation to conduct alleged to have occurred in July and August 2008. Two charges had been laid, the first relating to events in July 2008, the second in relation to events in August 2008.

[2] The charges contained a number of alternatives, incorporating misconduct, conduct unbecoming (in respect of July 2008 conduct), unsatisfactory conduct (in respect of August 2008 conduct), and negligence or incompetence reflecting on fitness to practise.

[3] By application dated 19 August 2011, Auckland Standards Committee No.2 ("ASC") sought leave to withdraw some of the alternatives contained in the charges, and to amend the form of the charges so that only matters of negligence or incompetence remained in each charge. This application resulted from Mr Korver indicating to ASC that in the event of such changes being made he would plead guilty to negligence or incompetence reflecting on his fitness to practise.

[4] The Tribunal heard the application on 2 September 2011. After considering the grounds in support of the application, the position adopted by Mr Korver, who consented to the application, and the public interest having regard to the protective purposes of the professional disciplinary regime, the Tribunal granted leave and allowed the application.

[5] As a consequence, Mr Korver faced two charges that he had been negligent or incompetent to such a degree as to reflect on his fitness to practise. Mr Korver pleaded guilty to both charges, and filed an admission dated 26 August 2011.

Background

[6] The agreed facts in support of the first charge related to Mr Korver failing in his professional obligations to a client, Ms S Fa'asolo, regarding the sale of her home. He failed to observe Rules of Professional Conduct relating to conflict of interest and independence.¹

[7] The agreed facts in support of the second charge related to Mr Korver failing to observe his professional duties as required by the rules of professional conduct when dealing with \$60,000 of Ms Fa'asolo's funds, and when reporting to her regarding transactions.²

¹ Rules 1.04 (acting for more than one party in a transaction without prior informed consent) and 1.07 (failing to take required steps including failing to decline to act)

² S.111(1) Lawyers and Conveyancers Act 2006 (failed to properly account), R12(6)(b) Lawyers and Conveyancers Act (Trust Account) Regulations 2008 ("LCTAR") (no authority for transfer or payment of funds) and R12(7) LCTAR (failure to properly report and account).

First Charge

[8] In relation to the first charge, Mr Korver admitted that he had received instructions from Ms James, a relative of Ms Fa'asolo, to act for her on the purchase of Ms Fa'asolo's property situated at Crummer Road, Auckland. Another legal firm had acted for Ms Fa'asolo in the past, and that firm was aware of the proposed sale by Ms Fa'asolo.

[9] When Mr Korver first advised the legal firm which had previously acted for Ms Fa'asolo that he was acting for the purchaser of the Crummer Road property, it responded to Mr Korver with a letter indicating that it did not consider the proposed transactions were in Ms Fa'asolo's best interests. Notwithstanding this advice, Mr Korver later agreed to also act for Ms Fa'asolo on the sale of the Crummer Road property to Ms James, or her nominee, when requested to do so by Ms James.

[10] The Sale and Purchase Agreement for the Crummer Road property provided that Ms James, or her nominee, would be the purchaser from Ms Fa'asolo. Its essential terms were that the sale price was \$640,000, payable as to \$208,000 in cash on settlement, with an acknowledgement of debt securing the balance of \$432,000. A trust, Bellaire Court Trust ("Bellaire"), was nominated by Ms James as the actual purchaser. Ms James had indicated to Ms Fa'asolo that Bellaire would allow Ms Fa'asolo to remain in the property and continue to use it as her home post settlement.

[11] Bellaire was to borrow \$466,000 from an institutional lender, and give first mortgage security over the Crummer Road property for that advance. The priority amount secured by the first mortgage was to be \$960,000 plus interest. This borrowing was notwithstanding that the actual payment obligation of Bellaire on settlement of the purchase from Ms Fa'asolo was only \$208,000 under the terms of the Sale and Purchase Agreement.

[12] It was accepted by Mr Korver that he did not ensure that Ms Fa'asolo fully understood the terms and effects of these arrangements, and the risk to her unsecured loan and her right to remain in the property post settlement.

[13] Mr Korver acknowledged that he did not properly or adequately advise Ms Fa'asolo as to: the complete nature of the transaction; the conflicting interests she had with others involved in the transaction, particularly Ms James; the terms and effect of documents Mr Korver had her sign (including a Conflict of Interest Client Acknowledgement) to implement the transactions; the fact she should take independent advice; and, the risks to her, especially regarding her unsecured loan, and her risk of eviction in the event the purchaser of her home defaulting on payments on the \$466,000 mortgage it had arranged on the property.

[14] Mr Korver acted for all parties involved in the transaction; Ms Fa'asolo, Ms James, Bellaire trustees, and the institutional lender taking the mortgage. He accepted, inter alia, in respect of this charge that;

- (a) He acted for Ms Fa'asolo and all other parties involved in the associated transactions, including Ms James and Bellaire, without

- properly disclosing the conflicting interests of the parties to Ms Fa'asolo,
- (b) He should properly have declined to act for Ms Fa'asolo, given the nature of the conflict and his inability to give independent advice.

Second Charge

[15] In relation to the second charge, after drawing down mortgage funds from the institutional investor, and settling the sale and purchase of the Crummer Road property, net funds of just over \$68,000 were available to Ms Fa'asolo. These funds were paid to her bank account on or about 3 August 2008. Some weeks later, on or about 22 August 2008, Ms Fa'asolo, assisted by Ms James, instructed her bank to remit \$60,000 to Mr Korver's trust account. When the amount was received by Mr Korver, he treated it as an advance to another client associated with Ms James.

[16] Mr Korver accepted, inter alia, in respect of this second charge that;

- (a) He failed to properly account to Ms Fa'asolo for the \$60,000 remitted to his trust account on or about 22 August 2008,
- (b) He advanced that \$60,000 to a third party without any instruction or other authority from Ms Fa'asolo,
- (c) He did not advise Ms Fa'asolo of the advance, nor ensure that it was properly documented and secured,
- (d) He failed to provide Ms Fa'asolo with a proper statement of transactions relating to her trust account with him.

Discussion

[17] In light of Mr Korver admitting the charges (as amended) and acknowledging the facts supporting the charges, the task for the Tribunal is to decide the appropriate sanction. The starting point of course is the purpose of the professional disciplinary regulatory regime affecting lawyers.

[18] Maintenance of public confidence in the integrity of the legal profession and in the standards of the profession, and protection of the public, are important features of the disciplinary regime.³

[19] Looking at the facts in Mr Korver's case, there has been a significant failure in the standards expected, and a failure to protect Ms Fa'asolo as a consumer of legal services.

[20] Mr Korver is an experienced practitioner, with 28 years experience, 14 of those as a sole practitioner in private practice. It is a concern that a practitioner of such experience could be so negligent, and so disconnected from the reality of the transactions he was undertaking, as not to recognise the conflict issues raised by the transactions and take appropriate steps. We accept that Mr Korver had a family crisis that came to a critical point in mid-late July 2008, but we do not accept that

³ Bolton v Law Society [1994] 2 All ER 486, and S.3(1) Lawyers and Conveyancers Act 2006

explains his conduct over the relevant period to which the charges relate, a period during which he had no difficulty documenting and completing the relatively complex transaction arrangements.

[21] Mr Korver did not provide Ms Fa'asolo with a proper explanation of the transactions and their effects; he did not advise Ms Fa'asolo that her usual solicitors had advised against the transactions as not being in her best interests; he did not adequately detail his position and inability to give independent advice arising from the conflicting interests of the parties to the transaction (despite having Ms Fa'asolo sign an acknowledgement of conflict); he did not provide for Ms Fa'asolo to receive independent advice; he did not outline the significant risks to Ms Fa'asolo arising from the transactions proposed; he did not properly account to Ms Fa'asolo after settlement on or about 3 August 2008; and, on or about 22 August 2008, he received and applied \$60,000 of Ms Fa'asolo's money to another client, associated with Ms James, without instruction or authority from Ms Fa'asolo.

[22] There is a continuing pattern of conduct during July and August, with at least four significant points during that period at which Mr Korver might have been expected to properly address matters with Ms Fa'asolo: 28 July, when he decided to act for all parties, notwithstanding the conflicts obvious from the transaction arrangements; 31 July, when he had all documentation signed (including a conflict acknowledgement) by Ms Fa'asolo, and notwithstanding that on 18 July he had received advice from her previous solicitors that they considered the transactions were not in Ms Fa'asolo's best interests; 3 August, when the transactions were settled; and, 22 August when \$60,000 was improperly applied.

[23] It was suggested for Mr Korver's that his conduct represented an isolated event. In one sense that is correct, but the Tribunal notes there were two separate matters relating to Ms Fa'asolo (the property transaction and the advance of funds) which supported the charges, and that the charges arose from a number of different acts and omissions by Mr Korver over the period July and August 2008. This is not one error of judgment, but a course of conduct over a two month period involving multiple actions and omissions by Mr Korver, and an absence of proper judgment throughout the period.

[24] Mr Korver ignored obligatory processes and procedures regarding conflict, and the need to obtain authority to advance funds. Those processes and procedures were designed to protect Ms Fa'asolo from the situation in which she found herself. Ms Fa'asolo entrusted her affairs to Mr Korver, and as a result of his conduct found her trust misplaced.

[25] It was submitted that Mr Korver was not aware of questionable matters relating to the property sale and related arrangements, or the position Ms James played in the arrangements. That may be so, although there were clear signals that dictated that Mr Korver should avoid the conflict situation that existed, such as the view of Ms Fa'asolo's former solicitors regarding the transaction not being in her best interests, the fact that Ms James instructed him, ran all aspects of the transaction, and attended any meeting he had with Ms Fa'asolo, and, the self-apparent nature and risks of the transactions to Ms Fa'asolo, especially when compared to the benefits Ms James and her related parties might obtain. The important fact in this is that Mr Korver's failure to comply with the relevant

professional rules and requirements meant that Ms Fa'asolo lost any chance of protection arising from the proper application of those rules and requirements. In the circumstances of this transaction, Mr Korver's negligence was gross and his failure to comply with basic professional obligations reckless.

[26] For Mr Korver it was submitted that he was remorseful, and he had accepted that his negligent conduct fell well short of the standard required of practitioners. It was noted that he had apologised, accepted liability for a large part of Ms Fa'asolo's financial loss, and, counsel advised, payment had been made pursuant to that liability. Mr Korver also agreed that he should pay the costs and expenses of ASC and also those incurred by the Law Society.

[27] For ASC, it was submitted that the appropriate sanction was suspension from practice. It suggested that an appropriate period would be between 3 and 6 months. ASC considered that in the circumstances the degree of failing by Mr Korver was significant, and the consequences of that failing severe. While acknowledging the effect on Ms Fa'asolo, we consider the principal issue of weight is Mr Korver's conduct. In pleading guilty to the charges, ASC noted that Mr Korver had acknowledged that his negligence was of such a degree as to reflect on his fitness to practise, which was supportive of suspension.

[28] Counsel for Mr Korver submitted that suspension would be a disproportionately harsh penalty, and that the public interest objectives of professional disciplinary sanction could be achieved without resort to suspension. She noted that suspension was not necessary to maintain public confidence in the profession, that Mr Korver would be adequately rehabilitated through the mentoring and further training he had proposed, and that Mr Korver's guilty plea recognised aspects of deterrence. It was also noted that, while not a complete answer to suspension, Mr Korver's personal circumstances and the consequences of suspension, such as the risk to the viability of his practice, should be taken into account.

[29] *Bolton*⁴ made it clear that it could never be an objection to an order of suspension in an appropriate case, that a solicitor might be unable to re-establish his practice when the period of suspension was over, as the public interest and public protection purposes of disciplinary sanctions are supreme.⁵ It also noted that;

*".....considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases."*⁶

[30] Mr Korver has admitted two charges of negligence or incompetence which reflect on his fitness to practise. They are serious charges, arising out of a significant failure to observe required standards and obligations to his client. Mr Korver's acts and omissions over a two month period, comprising the conduct for which he has been charged and which he has admitted, represent gross negligence

⁴ *Supra*, [1994] 2 All ER 486

⁵ *Ibid*, pp 492, paragraph j – 493, paragraph a

⁶ *Ibid*, p 492 paragraph g

and a lack of concern for appropriate process. Mr Korver has fallen a long way below required standards, and as a consequence his client has suffered considerably. Although Ms Fa'asolo has received some financial recompense following a Judicial Settlement Conference in the High Court, she remains out of pocket.

[31] Mr Korver's conflicted position and his failure to ensure his client received independent advice also breached one of his fundamental obligations, enshrined in the Lawyers and Conveyancers Act, to be independent in providing regulated services.⁷

[32] The Tribunal's unanimous view of the appropriate regulatory response to what has occurred is that Mr Korver should be removed from practice for a period. His failure to comply with basic conflict procedures, especially in the particular circumstances of conflict which existed here, and his misapplication of funds as an advance, made without any authority or advice, mark these matters as extremely serious. There is no doubt that his negligence does reflect on his fitness to practise, as Mr Korver has himself acknowledged by his guilty plea. Ms Fa'asolo placed her trust in him, and by his deliberate actions he failed to protect her.

[33] We consider a period of suspension is appropriate. To quote Sir Thomas Bingham MR in *Bolton*:⁸

“Any solicitor who is shown to have disregarded his professional duties with anything less than complete integrity, probity, and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal.”

[34] In *Bolton* it was also noted that even in the absence of dishonesty (which, it indicated to the Tribunal, is the position ASC accepts regarding Mr Korver), falling below the required standards of integrity, probity, and trustworthiness remains a serious issue, because it arises in respect of a member of a profession whose reputation depends on trust.⁹ This concept has statutory force in New Zealand, being included as a purpose of the Lawyers and Conveyancers Act 2006.¹⁰

[35] The High Court in *Daniels v Complaints Committee No. 2 of the Wellington District Law Society*¹¹ provided a useful summary regarding suspension, which effectively reflects the Tribunal's view of Mr Korver's situation;

“A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of

⁷S.4(b)

⁸ *Bolton v Law Society* supra, at 491 paragraph h

⁹ *Ibid*, 491 j

¹⁰ S.3(1)(a)

¹¹ CIV-2010-485-0227 (High Court, Wellington) 8 August 2011

*the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.*¹²

[36] Mr Korver's conduct reflects a series of acts and omissions over a two month period. The acts and omissions represent serious failings. His conduct falls a long way below required standards of competence and compliance, and the Tribunal considers a period of suspension is appropriate in all the circumstances.

[37] The Tribunal agrees that Mr Korver may benefit from some mentoring and supervision as proposed by him, and we will provide for that in our orders. Mr Korver also proposes that he undertake professional development training. If he wishes to do that then that is a matter for him, but we do not consider it necessary to order that in addition to the mentoring and supervision order we propose.

[38] Mr Korver has indicated that he will meet the costs and disbursements of ASC and of the New Zealand Law Society. We will make orders accordingly. He has also indicated a willingness to pay fines of \$5,000 on each charge. Given the Tribunal's proposal to impose suspension and costs, also ordering fines would be too harsh in all the circumstances, and we will not impose any fines on Mr Korver.

Decision

[39] The Tribunal HEREBY ORDERS that WILLIAM GERALD KORVER;

In respect of Charge 1;

- (a) be suspended from practice as a barrister and as a solicitor for a period of 6 months. This suspension is to run concurrently with that imposed in respect of Charge 2, and is to commence on 17 September 2011 and end at midnight 16 March 2012;
- (b) be, and is hereby, censured, for his gross negligence, his lack of professional care and concern for a client, and his non-compliance with obligatory procedures which would have avoided the situation of conflict and lack of independent advice in which his client found herself. His performance as a barrister and solicitor on whom a client placed trust and reliance has been well below required standards;
- (c) pay Auckland Standards Committee No. 2 50% of the total costs and expenses noted in paragraph [41] below.

In respect of Charge 2;

- (a) be suspended from practice as a barrister and as a solicitor for a period of 6 months. This suspension is to run concurrently with that imposed in respect of Charge 1, and is to commence on 17 September 2011 and end at midnight 16 March 2012;

¹² *Daniels*, supra, at Paragraph [24]

- (b) be, and is hereby, censured for utilising a client's funds as an advance for another client where that purpose had not been authorised by the client, and failing to properly advise the client regarding the advance. These are serious failings, and Mr Korver's conduct in this regard is well below the required standards.
- (c) pay Auckland Standards Committee No. 2 50% of the total costs and expenses noted in paragraph [41] below;
- (d) reimburse the New Zealand Law Society the amount it must pay the Crown as noted in paragraph [42] below; and,
- (e) take the advice in relation to the management of his practice as set out in paragraph [43] below, to ensure that the risk of Mr Korver repeating his failure to observe the professional obligations noted in that paragraph is reduced as much as is reasonably possible. Leave is reserved to each of the Applicant and the Respondent to make an application, on notice to the other, to vary the requirements set out in paragraph [43] below from time to time, where circumstances may make a variation necessary or desirable.

[40] At the hearing Mr Korver sought permanent name suppression. The Tribunal declined that application, but did order that there be no publication of the detail of the personal family matters which had been raised by Mr Korver as a factor to be taken into account by the Tribunal when considering the charges. The reason the Tribunal declined Mr Korver's application for permanent name suppression was that he had pleaded guilty, lodging admissions to both charges, and there is a strong public interest in knowing the name of a practitioner found to have been guilty of serious professional disciplinary charges.¹³ Nothing raised by Mr Korver outweighed the importance of freedom of speech recognised by S.14 New Zealand Bill of Rights Act 1990, the importance of openness in judicial proceedings, and the right of the media to report proceedings.¹⁴ The Tribunal notes also that the matter has become largely academic, given the sanction of suspension it has applied, and the publication that must accompany such sanction.¹⁵

[41] ASC has submitted costs and expenses totalling \$29,575.38 relating to all matters concerning Mr Korver. Mr Korver has accepted that he will pay these costs and expenses. Two charges were heard, one relating to conduct occurring at the time the Law Practitioners Act 1982 was in force,¹⁶ and one relating to conduct occurring at the time the Lawyers and Conveyancers Act 2006 was in force.¹⁷ Both charges were laid and heard under the Lawyers and Conveyancers Act 2006, the charge relating to conduct in July 2008 falling under the transitional provisions contained in S.351 Lawyers and Conveyancers Act. The costs orders made nominally attribute 50% of the total costs and expenses to each charge, so that in all Mr Korver is to pay the total amount of \$29,575.38 which he has agreed.

[42] Crown costs payable by the New Zealand Law Society under S.257 Lawyers and Conveyancers Act 2006 are certified at \$11,600.

¹³ T v Director of Proceedings CIV-2005-409-002244 (High Court, Christchurch) 21 February 2006

¹⁴ R v Liddell [1995] 1 NZLR 538, 546-7

¹⁵ Ss 255 and 256 Lawyers and Conveyancers Act 2006

¹⁶ Pre 1 August 2008

¹⁷ The Lawyers and Conveyancers Act 2006 came into force on 1 August 2008

[43] If Mr Korver decides to re-enter practice on his own account (whether in partnership or otherwise) after completing his period of suspension, he must arrange for a legal practitioner who is practising on his or her own account to provide him with advice, as a mentor and supervisor, in relation to the management of his practice for a period of 18 months. Such advice is to cover appropriate ethical practices when providing regulated services, compliance with the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008, and compliance with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. The person currently proposed by Mr Korver as the person to provide him with such advice is Mr D Thomas, whom the Standards Committee has indicated would be an acceptable person to the New Zealand Law Society. In the event that Mr Thomas becomes unavailable, then any other practitioner practising on his own account and approved by the New Zealand Law Society for the purpose of providing such advice to Mr Korver may undertake the mentoring and supervisory role. Mr Korver is to provide a written report, certified as true and correct by him and certified as true and correct to the best of the knowledge and belief of the person providing the advice in respect of Mr Korver's practice under this requirement, to the New Zealand Law Society at its Auckland Branch every 3 months during the 18 month period. The reports shall cover such matters as the Society may reasonably require to demonstrate that Mr Korver is taking the specified advice and having regard to the reason this advice has been required, as noted in paragraph [39](e) above. The term of the 18 month requirement to take advice shall commence at the time Mr Korver re-enters legal practice.

Dated at Auckland this 14th day of September 2011

D J Mackenzie
Chair