

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 22
LCDT 004/15

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE No. 5**
Applicant

AND

KENNETH YEE
Former Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr G McKenzie

Mr K Raureti

Ms C Rowe

Mr I Williams

HELD at Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 16 June 2015

DATE OF DECISION 25 June 2015

APPEARANCES

Mr R McCoubrey for the Standards Committee

No Appearance by the Practitioner

**RESERVED DECISION OF NEW ZEALAND
LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
PROVIDING REASONS FOR ORDER STRIKING PRACTITIONER
FROM THE ROLL AND MAKING CONSEQUENTIAL ORDERS**

[1] It is a sad task to strike off a practitioner with a lengthy and previously unblemished career in the legal profession.

[2] However, strike off is the only proportionate response to dishonesty and subterfuge on the part of a lawyer, particularly when this involves the misuse of funds held on behalf of clients.

[3] The solicitors trust account has long been regarded as “sacrosanct”.¹ Dealing with its funds, as if using a personal bank, as did Mr Yee, is considered to be at the highest level of professional misconduct and culpability.

[4] The purpose of disciplinary proceedings are primarily for the protection of the public. *“Closely allied to the protective object, professional discipline also aims to safeguard the reputation of the profession, which is more important than the fortunes of any individual member”*.²

[5] When discussing the purposes of imposing seemingly harsh consequences upon a practitioner, Sir Thomas Bingham MR said:

“... To maintain the reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession’s most valuable asset is its collective reputation and the confidence which that inspires.”³

¹ *Bolton v Law Society* [1994] 2 All ER 486, 490

² *Dal Pont*: “Lawyers Professional Responsibility” 5th ed. P 742.

³ See footnote 1 at p 492.

[6] Later, acknowledging that a lawyer can produce glowing tributes from colleagues or raise serious consequences to his or her family, His Honour emphasised the nature of professional responsibility, and the collective principles which that must invoke:

“The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”⁴

[7] An order for strike off can only be made if the Tribunal, comprised of five members, unanimously agrees that the lawyer is no longer a fit and proper person to be a practitioner.⁵

[8] In a letter to the New Zealand Law Society very soon after Mr Yee’s conduct was discovered by his firm, and his employment terminated, he fully accepted and took responsibility for the behaviour complained of. This approach is very much to his credit.

[9] The two charges brought against Mr Yee⁶ disclose misuse of client funds in two ways. First he diverted funds to companies associated with him, accounting to the clients as if charging fees. However the fees were never actually paid to the firm. This behaviour occurred over a period of approximately five years from late 2008 or early 2009 until 2014.

[10] Mr Yee had been a very longstanding partner in the firm but following bankruptcy in September 2012 he had become an employee of the firm.

[11] The total amount taken by him in this manner, and thus depriving the firm of fees, was \$95,706.41.

[12] The second method by which funds were misused, was by his taking funds from the trust account into one of his companies as a “loan”. The funds were then repaid either to the trust account or directly to the client.

[13] Funds used in this manner amounted to \$505,155.17 and have been fully repaid to the clients. When discovered, Mr Yee provided *post facto* authorities for

⁴ See footnote 1 at p 493.

⁵ Section 244, Lawyers and Conveyancers Act 2006 (“LCA”).

⁶ Charges and Particulars are annexed as a Schedule to this decision.

some of the “loans”. However clearly there was a breach of his duty of fidelity to the client, a conflict of interest that would appear to be irremediable, and a breach of Rule 5.2 of the LCA (Lawyers: Conduct and Client Care) Rules 2008, and of Regulation 7 of the LCA (Trust Account) Regulations 2008.

[14] In relation to the fees that were diverted to Mr Yee directly, (Charge 1), we found that both limbs of s 7(1)(a)(i) and s 7(1)(a)(ii) of the LCA were satisfied. The behaviour would clearly be regarded by lawyers of good standing as “disgraceful or dishonourable”; and additionally we considered it to be a “wilful or reckless” contravention of Regulations 9 and 10 of the LCA (Trust Account) Regulations 2008 and Rule 9.3 of the LCA (Lawyers: Conduct and Client Care) Rules 2008.

[15] We found misconduct to have been established in respect of both charges to the high standard on the balance of probabilities, as required.

[16] Evidence in support of the charges had been provided in the form of an affidavit from one of the practitioner’s former partners (and employer); and as to process by Mr Heyns of the New Zealand Law Society, who produced a report from a New Zealand Law Society inspector. The partner provided the Tribunal with a schedule of the transactions where the funds had been misused over the five-year period, detailing the diverted fees and the “loans”.

[17] In the course of the hearing Mr McCoubrey provided the Tribunal with two letters from the practitioner, one of July 2014 and one of September 2014, containing his clear admissions, and also setting out some of the background to the offending.

[18] The practitioner had experienced extreme financial stress after he was sued for very large sums of money as a trustee of a family trust for whom the firm acted. He was sued in his personal capacity and over a period of years despite the firm attempting to put loans in place to repay the claimants and petitioners in his bankruptcy, by 2012 an adjudication of bankruptcy against the practitioner occurred.

[19] In his letter Mr Yee describes how he became seriously depressed and unwell, but accepts that his behaviour was unacceptable and wrong. All of the funds taken as loans were repaid to clients and Mr Yee expresses his wish, when he is discharged from bankruptcy to attempt to repay his former partners the diverted fees.

[20] The Standards Committee seeks recovery of its costs in prosecuting this matter and reimbursement of the mandatory Tribunal costs to be ordered against it.

[21] In the past the Tribunal has accepted the submission that a bankruptcy ought not to prevent the making of such orders.

[22] Mr Yee has not taken any part in these proceedings following their service upon him and, despite being informed of the hearing, chose not to appear. He has however taken responsibility for his actions at a very early stage.

[23] We also note that he practiced for some 40 years without ever having incurred any prior disciplinary record. He deserves considerable credit for this. In addition he has provided public service as a city councillor for a period of six years from 1998 to 2004.

[24] He has not taken any steps which have increased the costs of these proceedings or delayed them in any way, simply choosing not to participate. Having regard to all of these circumstances, we consider that he ought not to bear a full costs order against him.

[25] There will be an order pursuant to s 249 that he pay 75% of the costs of the Standards Committee (\$7,971.42) therefore, in the sum of \$5,978.57.

[26] There will be an order pursuant to s 257 that the New Zealand Law Society pay the costs of the Tribunal in the sum of \$1,504.00.

[27] There will be a further order that the practitioner reimburse the New Zealand Law Society for the full costs of the Tribunal in this manner.

DATED at AUCKLAND this 25th day of June 2015

Judge D F Clarkson
Chair

CHARGES AND PARTICULARS

Auckland Standards Committee 5 (**Committee**) charges Kenneth Yee (**former practitioner**) with:

Charge 1 misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (**Act**).

Particulars:

- 1 At all material times the former practitioner was enrolled as a Barrister and Solicitor of the High Court of New Zealand. He was a partner in the firm X (**incorporated firm**).
- 2 Whilst a partner at the incorporated firm, the former practitioner used client funds in the following ways:
 - (a) When monies were in the client trust ledger for legitimate reasons, Mr Yee diverted part of those funds to his companies. He accounted to the client following completion of the transaction as if the monies taken were firm fees even though no firm fees were actually paid.
 - (b) On some occasions he did not take enough so there would be a small balance left in the trust ledger which he then also took to bring the ledger down to zero. On other occasions he took too much and then refunded some monies to the trust ledger to write it off again to bring the trust ledger to zero.
 - (c) It appears that the amount taken via this method was \$95,706.41.
- 3 This is conduct that:
 - (a) would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or
 - (b) consists of a wilful or reckless contravention of Regulations 9 and/or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and/or Rule 9.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Charge 2: misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (**Act**).

Particulars:

- 1 Paragraphs 1 and 2 of charge 1 are repeated.
- 2 On a number of occasions Mr Yee received money into the Trust account and paid all or part of this money to one of his companies. Mr Yee characterised these transaction as " loans". The total amount taken by way of loans was \$505,155.17.
- 3 Some of this was repaid to the Trust Account and some was repaid directly to the client.
- 4 At the time of the discovery of these loan transactions there was no documentation to show that those clients consented nor received independent advice.
- 5 This is conduct that:
 - (a) would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or
 - (b) consists of a wilful or reckless contravention of Regulation 7 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008; and/or
 - (c) consists of a wilful or reckless contravention of Rule 5.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, in that the former practitioner did not exercise his professional obligations solely in the best interests of his client.

And upon the grounds set out in the affidavits of Garreth Heyns and (victim).