

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 32

LCDT 012/15

**IN THE MATTER**

of the Lawyers and Conveyancers  
Act 2006

**BETWEEN**

**AUCKLAND STANDARDS  
COMMITTEE 2**

Applicant

**AND**

**DAVID JOHN COX**

Practitioner

**CHAIR**

Judge B J Kendall (retired)

**MEMBERS OF TRIBUNAL**

Ms S Fitzgerald

Mr S Grieve QC

Mr P Shaw

Mr W Smith

**HEARING** 24 September 2015

**HELD AT** Auckland District Court

**DATE OF DECISION** 2 October 2015

**COUNSEL**

Mr S Haszard for the Standards Committee

Mr J Billington QC for the respondent

**REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS  
AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGE AND  
PENALTY**

[1] The practitioner faced one charge of Misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) and alternatively under s 7((1)(b)(ii) of the Lawyers and Conveyancers Act 2006 (“the Act”). He was charged in the alternative with Negligence or Incompetence under s 241(1)(c) of the Act and in the further alternative with Unsatisfactory conduct within the meaning of s 12(a) - 12(c) of the Act.

[2] The practitioner was the solicitor acting for David Simpson between 2004 and 2013 and for a number of companies controlled by, or associated with, Mr Simpson. The practitioner was also the solicitor during most of that time for Mr Simpson’s mother.

[3] Portside Hotel Limited was a company under the control of Mr Simpson. The practitioner became the sole director of that company after Mr Simpson became a bankrupt. The company entered into an agreement to sell its management rights of the Portside Hotel.

[4] Mr Simpson’s mother held a third mortgage over a property at Muriwai and a third ranking general security agreement (“GSA”) over the company’s assets, including the management rights of the Portside Hotel. It became necessary to obtain a release from the GSA held by Mrs Simpson so that the sale of the management rights could proceed.

[5] Mrs Simpson had been diagnosed with Alzheimer’s disease and deemed not to have legal capacity. It became necessary to apply to the Family Court for the appointment of a property manager and welfare guardian.

[6] The practitioner swore an affidavit in the proceedings before the Family Court in which he deposed that if the sale of the management rights of Portside Hotel Limited proceeded, then the full proceeds of sale would be paid to the ASB in reduction of its mortgage over the Muriwai property which would thus improve Mrs Simpson's position by the same amount.

[7] David Spencer, solicitor, was appointed a temporary property manager on 2 May 2013 in respect of Mrs Simpson's property. He was authorised to sign a release of Mrs Simpson's GSA.

[8] There was correspondence between the practitioner and Mr Spencer about the release of the GSA. There was a letter from the practitioner to Mr Spencer dated 13 May 2013 in which the practitioner confirmed that the ASB required payment of the full proceeds of the sale amounting to \$500,000.00 as a prerequisite of its release of the first banking GSA. On that basis Mr Spencer signed a deed of partial release of and discharge of Mrs Simpson's security interest on 13 May 2013. He sent it to the practitioner on the same day.

[9] On 15 May 2013, the practitioner received a draft settlement statement and a draft repayment statement from the solicitors acting on the sale of the management rights of the Portside Hotel. The draft repayment statement showed that the solicitors proposed making deductions from the sale proceeds such that the net amount to be paid to ASB was to be \$353,094.09. Included in the proposed deductions was the sum of \$39,120.92 in respect of fees detailed in an overall statement which the practitioner had prepared on 13 May and forwarded to those solicitors.

[10] The practitioner instructed the solicitors to make the deductions which had been set out. He did so on 15 May 2013 immediately prior to the settlement of the sale of the management rights. He did not inform Mr Spencer of the change or that he had authorised the deductions.

[11] The allegation is that the practitioner had a clear duty to inform the other parties, including Mr Spencer, that the situation had changed in that the amount to be paid in reduction of debt was greatly less than he had earlier said it would be.

[12] One effect of ASB taking less than the full proceeds of sale was that the practitioner's firm of which he was a partner received payment of \$39,120.92.

[13] In response to the charge, the practitioner accepted that his action in not advising Mr Spencer of the changed situation was conduct that was unsatisfactory within the meaning of s 12 of the Act.

[14] The applicant and Counsel for the practitioner have held detailed discussions about the matter and have reached a resolution whereby the applicant has agreed to resolve the proceeding on the basis of admitted unsatisfactory conduct by the practitioner. The applicant and the practitioner through his counsel have agreed on a suggested penalty.

[15] The Tribunal has been asked to approve the proposed resolution and penalty and to permit withdrawal of the other charges.

[16] The Tribunal, having considered the papers, held some concerns about the practitioner's conduct which gave it concern as to whether or not it should accept the proposed resolution of the charge. In particular it was concerned that on 13 May 2013 the practitioner repeated in a letter to Mr Spencer that the full proceeds of sale were to be applied to reduce the debt to the ASB. At the same time he sent fees statements to the solicitors acting for the vendor on the sale totalling \$39,120.92. The Tribunal was also of the view that the practitioner's statement in his affidavit about payment of the full proceeds of sale which he repeated in later correspondence to Mr Spencer should be given the same weight as a solicitor's undertaking given that the statement was made on oath.

[17] The Tribunal elected to question the practitioner. He candidly accepted that the statement which he made in his affidavit filed with the Family Court should be considered seriously. He also accepted that he had failed to advise Mr Spencer of the reduction in the amount to be repaid to ASB in circumstances where he had an obligation to do so. While he had submitted the fees statement, he did not agree that it necessarily meant that he expected that the fees would be paid to his practice out of the proceeds of the sale. The Tribunal has difficulty accepting that statement. He said that the solicitors acting on the sale had asked him to provide a note of his fees

and he accepted that it was in the context of the forthcoming settlement. It stretches credulity for him to say that he did not anticipate that those fees would be paid to him out of the proceeds of the settlement. Why else would he be asked to and present them in that particular context?

[18] The practitioner's counsel submitted that at the time he authorised the deductions, the practitioner was ethically obliged to Mr Spencer rather than being in breach of professional standards. The practitioner did not do what he ought to have done and has accepted that his failure constituted conduct that was unsatisfactory.

[19] The Tribunal took time to consider the proposed resolution. It concluded that the practitioner's conduct was unsatisfactory. In reaching that conclusion it has found that his failure to advise Mr Spencer was not intentional. It has accordingly approved the resolution agreed on between Counsel.

[20] It records a finding of unsatisfactory conduct and grants leave to the applicant to withdraw the other alternative charges.

[21] Agreement has been reached on penalty. The Tribunal considers that the orders proposed are appropriate. It accordingly makes the following orders by consent.

- (a) The practitioner is censured.
- (b) He is fined \$7,500.00.
- (c) He is to pay the Law Society's costs of \$19,791.96.
- (d) He is to refund to the Law Society the Tribunal's costs which are certified in the sum of \$2,984.00.

[22] The Tribunal records the censure of the practitioner as follows:

Mr Cox,

*You have admitted unsatisfactory conduct primarily with reference to your interaction with a fellow practitioner, David Spencer. You emphasised to him on more than one occasion that the full proceeds of sale of the management rights of Portside Hotel would be paid to ASB in reduction of its debt. You failed to advise that there would be a significant reduction in the amount eventually paid in circumstances where you had an obligation to do so. It was the Tribunal's concern that you had intentionally done so. It did, however, conclude that on balance it was an oversight rather than an intentional failure. That failure of yours did compromise Mr Spencer's ability to authorise the partial release of Mrs Simpson's GSA. Your legal practice benefitted to the extent of \$39,120.92. This was a serious failing on your part for which you are properly censured.*

[23] The practitioner has made application for the non-publication of his name. His Counsel did not actively pursue the application, but left the matter for the Tribunal to determine. Our finding is that the practitioner has not advanced any matter that overrides the presumption that publication of a practitioner's name should occur having regard to the public interest and the principle of open justice.

[24] The Tribunal accordingly declines the application.

**DATED** at AUCKLAND this 2<sup>nd</sup> day of October 2015

BJ Kendall  
Chair