

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

[2014] NZLCDT 34

LCDT 003/14

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 4 OF THE NEW
ZEALAND LAW SOCIETY**

Applicant

AND

JOHN APPLEBY

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Mr P Shaw

Mr W Smith

Mr I Williams

HEARING

At Auckland

DATE

29th May 2014

COUNSEL

Ms H Ifwersen for Applicant

Mr C Pidgeon QC for Respondent

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

[1] The Practitioner faced a charge of misconduct which arose from his failures as supervisor of his Law firm's trust account in respect of the following particular breaches of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008:

- (a) Failing to reconcile the firm's trust account (including its Interest Bearing Deposit account) (**IBD**) between about December 2011 and June 2013.
- (b) Failing to ensure that the firm's interest in trust account was not overdrawn between about May 2013 and July 2013; or
- (c) Failing to ensure that all of the firm's individual client ledgers were not overdrawn between about September 2011 and June 2013;
- (d) Failing to update the firm's **IBD** account records between about March 2012 and June 2013;
- (e) Failing to receipt interest payments for **IBD** clients of the firm between about December 2011 and June 2013.

[2] A final particular of the charge alleged that the practitioner during the period between about September 2011 and July 2013, in his capacity as supervisor of the firm's trust account, submitted monthly certificates to the Law Society under reg 17(1) knowing that they were false and/or being reckless as to the accuracy of their contents.

[3] The practitioner was charged in the alternative with negligence or incompetence in a professional capacity and with a further alternative charge of unsatisfactory conduct within the meaning of s 12(a) and/or s 12(c) of the Act.

[4] The respondent admitted the particulars of the charge outlined in paragraph 1 above. He admitted the facts of the particulars relating to the submitting of monthly certificates that are referred to in paragraph 2 but denied that he knew they were false and/or that he was reckless as to the accuracy of the contents.

[5] The Tribunal heard the charge in Auckland on 29th May 2014. It found the practitioner guilty of misconduct. After hearing from Counsel, it then considered penalty and determined the following.

- (a) That the practitioner be censured.
- (b) That he pay a fine of \$10,000.00.
- (c) That he pay the costs of the Law Society in the sum of \$21,202.58.
- (d) That he refund to the Law Society the Tribunal's costs in respect of the charge of misconduct which are fixed at \$4,038.00.
- (e) That the practitioner (in recognition of his obligations) undertake in writing;
 - (i) To continue to employ Mrs Postlewaight as trust accountant.
 - (ii) To notify the Law Society when Mrs Postlewaight's employment with his firm ends.
 - (iii) That Mrs Postlewaight, while employed by the practitioner will countersign a hard copy of every monthly certificate confirming its accuracy. That certification is to be provided to the Society for a period of 12 months.

[6] This judgment contains the reasons for finding the practitioner guilty of misconduct; and for the penalty imposed; and costs.

[7] The Practitioner was the Trust Account supervisor of Ladbrooks Law Limited during the period from September 2011 to July 2013.

[8] A New Zealand Law Society inspector carried out an inspection of the firm's trust account on 19th February 2013. The inspector reported to the Lawyers Complaints Service and the practitioner on 10th March 2013. He found the practitioner's trust account systems, procedures and records to be less than satisfactory in the following respects:

- (a) The records did not disclose clearly the position of money in the trust account, and whether or not they were up to date.
- (b) There was no evidence of effective and accurate reconciliation of the **IBD** account since December 2011.
- (c) There was lack of proper receipting processes which led to major issues about lack of proper reconciliation.
- (d) There was no authorisation process in place relating to journal transfers.
- (e) There was a lack of clarity about transactions between the trust account of a client and the firm's office account.

[9] These concerns (particularly in respect of the **IBD** account) led to the Applicant commencing an own motion investigation of the firm's trust account.

[10] The practitioner had advised that he "was entirely responsible for managing" his "own trust account".¹

[11] A further inspection carried out on 10th and 11th June 2013 was a "General Review" of the trust account. The inspector found that there had been considerable improvement in the standard of procedures and the running of the trust account. There remained issues which required urgent attention including a fact that the firm's

¹ Respondent's letter of 28th March 2013.

ledger was overdrawn as well as one of the client's ledgers. This meant that there was \$528.40 "missing" in that the bank statement was short, by that amount, of what it should have been. The Respondent did subsequently fix the problem.

[12] The inspector found, as a result of the review process, that the Practitioner had not:

- (a) Reconciled the firm's trust account (including the **IBD**) between December 2013 and June 2013.
- (b) Ensured that the firm's trust account was not overdrawn between end May 2013 and the beginning of July 2013.
- (c) Updated the firm's **IBD** account records between about March 2012 and June 2013.
- (d) Receipted interest payments for **IBD** clients of the firm between about December 2011 and June 2013.

[13] A practitioner is required by Regulation 17 of the Lawyers and Conveyancers (Trust Account) Regulations to complete and file with the Law Society a monthly certificate stating that during the relevant month the practice has complied with the Regulations. The certificates that the respondent filed were not correct in that the firm's trust account had not been correctly reconciled arising from inadequate record keeping.

[14] The respondent has admitted responsibility for the failings that are detailed in this judgment and in particular that the certificates he filed were incorrect. He denies that he knowingly or recklessly filed them. He accepts that he did so negligently.

[15] He advanced the following reasons for his failures:

- (a) He relied on the firm's source documents (including bank statements) as a way of satisfying himself that the trust account was in order but did not operate a manual accounting system as required by the Regulations.

This was during the period of time that the computerised 'Affinity' system which he had installed had failed.

- (b) He had serious concerns for the welfare of his wife during her pregnancy. Her condition was life-threatening to her and to their unborn child. Mr Appleby's evidence, which we accept, detailed the extraordinary pressure he was under. These pressures caused him to develop tunnel vision focussing on his family problems such that he did not attend to the difficulties with his accounting systems and to his obligations to the Law Society.
- (c) He did not get proper training or technical support from the supplier of the programme.
- (d) Not all his staff received training in the 'Affinity' programme and he suffered changes in staff personnel.
- (e) He engaged another trust accountant to deal with the problems with 'Affinity', but it was not until January 2013 that he was able to make headway with resolution of the problems.

[16] In his evidence before the Tribunal, the respondent said that he struggled to manage 'Affinity'. He could not get it to function correctly. He had incorrect data and whatever was attempted seemed to make it worse. He said that he "*knew the records were rubbish*". He resorted to source documents including bank statements, receipts and settlement statements. He admitted that with hindsight he should have reverted to a manual trust accounting system. He said that by mid-2012 he was "*pushing towards crisis*".

[17] With regard to the monthly certificates, the respondent said that he did not put his mind to the issue of correctness and "*just kept ticking the boxes*". When challenged, the respondent did concede that his actions were close to wilful blindness.

[18] Misconduct has been described as a deliberate departure from accepted standards, or such serious negligence as, although not deliberate, to portray indifference to and an abuse of professional privileges.²

[19] The Tribunal has found that the respondent is guilty of misconduct having regard to;

- (a) The length of time over which false monthly certificates were signed by the respondent.
- (b) The extent of his admitted knowledge.
- (c) His failure to implement a proper manual trust accounting system and therefore a reliable system for reconciliation of the trust account.

[20] The Applicant sought orders suspending the practitioner; for the payment of the New Zealand Law Society's legal and investigation costs; reimbursement of the costs of the hearing; and censure. Reference was made to the decision in *Manktelow*³

[21] In reaching its decision on penalty, the Tribunal has taken into account the following aggravating features.

- (a) The fact that the trust account was overdrawn.
- (b) The length of time over which the offending occurred as to certificates in particular.
- (c) The respondent's admitted awareness of the problems he was encountering.

[22] The Tribunal has balanced against the aggravating features the following factors that mitigate in the respondent's favour namely;

² *Re A (Barrister and Solicitor of Auckland) [2002]* and *Complaints Committee No 1 of the Auckland District Law Society v C [2008]* 3 NZLR 105, mentioned at para [36] of *In the Matter of D*, [2013] NZLCDT 46.

³ *Wellington Standards Committee 1 v Manktelow [2012]* NZLCDT 30.

- (a) There was no dishonesty beyond the signing of the certificates.
- (b) He did not attempt to conceal what was happening and was open and helpful to the Law Society throughout its investigation.
- (c) He was experiencing a severe and distressing family problem.
- (d) His problem with the computerised trust accounting system was extraordinary. It was clear to the Tribunal that the Respondent was a guinea pig. The programme was sourced from Australia. The respondent received little help with the problems from the supplier.
- (e) He was not the subject of a prior warning as was the case in *Manktelow*⁴ where, in addition to warning, Manktelow withdrew \$34,000.00 from the trust account for his own advantage. Here, there was no personal advantage.
- (f) There was no personal gain to the respondent arising from his failures.
- (g) There was no complaint from clients and there was no loss to any client.

[23] The Tribunal considers that the respondent's offending more closely resembles that of the practitioner in *D* already referred to in paragraph [18] above. There the Tribunal distinguished the practitioners conduct from that of Manktelow in which the key differences were:

- (a) Deliberate behaviour of the practitioner in Manktelow.
- (b) The overdrawing of the trust account occurred in spite of prior warnings.

[24] The Tribunal went on to find that D's conduct involving mistake, non-comprehension and a slowness to find the true position did not dictate a need for suspension. Having taken into account the need to protect the public and to protect the reputation of the profession, it decided against suspension of the practitioner.

⁴ [2012] NZLCDT 30.

[25] We take the same view with regard to this respondent. We are satisfied that the respondent's failures did not create concern for the safety of the public, nor did we see a demonstrated need to protect professional standards. We have been satisfied that this was an isolated example. The practitioner has been clearly remorseful and has rehabilitated himself by the steps he has taken to ensure there is no repetition. We take into account as well that he has rectified the problems which formerly beset him. He has engaged an experienced trust accountant. She has an established record of competence in that she has from time to time been retained by the New Zealand Law Society and had previously worked full-time for the respondent.

[26] All of the above matters have led the Tribunal to make the finding of misconduct and impose the penalty and costs set out in paragraph [5] of this decision. We emphasise that our decision is to be seen as a beneficent response to the offending of a practitioner who was under extraordinary pressure.

DATED at Auckland this 19th day of June 2014

BJ Kendall
Chairperson