NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 47

LCDT 019/14

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**TIMOTHY JOHN BURCHER** and **DAVID GOULD RUSSELL SHORT** Respondents

LCDT 009/15

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**TIMOTHY JOHN BURCHER** and **DAVID GOULD RUSSELL SHORT** and **RONALD JOHN MACDONALD** Respondents

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Ms S Sage

Mr P Shaw

HEARING 30 November & 1 December 2015

HELD AT Auckland District Court

DATE OF DECISION 18 December 2015

COUNSEL

Mr N Williams and Mr M Treleaven for the Standards Committee

Mr C Morris for practitioner Mr Burcher

Mr J Katz QC for practitioner Mr Short

Mr G Blanchard for practitioner Mr Macdonald

DECISION OF THE TRIBUNAL

[1] Messrs Burcher, Short and Macdonald are senior, respected practitioners, formerly in partnership with each other, who have come before the Tribunal on charges relating to non-compliance with the rules governing the operation of solicitors' nominee companies.

[2] The breaches of the rules cover periods dating back before the coming into force of the LCA,[1] so the charges are divided into the periods before 1 August 2008 and after that date.

[3] There are also two sets of charges, relating to two reports prepared by the New Zealand Law Society Inspector, Mr Tim Maffey.[2]

[4] What makes the later charges more serious, are that a number of the breaches occurred after the first report was delivered, when the partners ought to have been acutely aware of the need for scrupulous compliance.

[5] The nominee company was managed on a day to day basis by Mr Burcher, who accepts he must bear the primary responsibility for the defects identified by Mr Maffey. For this reason he has pleaded guilty to two charges of misconduct relating to the breaches identified by Maffey 2, and two charges of "*negligence … of such a degree or so frequent as to tend to bring the profession into disrepute*", arising out of Maffey 1.

[6] Mr Short also pleaded guilty to charges arising from both reports, but in his case, all four are at the level of "*negligence … of such a degree or so frequent as to tend to bring the profession into disrepute*".

[7] Mr Short had a significantly less involvement in the daily running of the nominee company (which will be discussed later) but accepted, as a partner and director of the nominee company, he must take responsibility for a lack of governance.

[8] Mr Macdonald had almost nothing to do with the nominee company. But, given the non-compliance with the rules that continued after Maffey 1, he also accepted that he had fallen short in his obligations as a partner and director of the nominee company to ensure compliance. Accordingly, he pleaded guilty to two charges of "*negligence … of such a degree or so frequent as to tend to bring the profession into disrepute*".

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[1] Lawyers and Conveyancers Act 2006.
[2] These reports are referred to in the proceedings and in this decision as "Maffey 1" and "Maffey 2".

Background

[9] The firm of Short & Partners had operated a nominee company for many years. Over the period in question we understand that it handled funds of up to $27 million, belonging to approximately 170 investors. Until 1999 Mr Short had been the partner responsible for management of the nominee company. From that time this role was taken by Mr Burcher who was also the supervising trust account partner (before the LCA) and the trust account supervisor (after the LCA).

[10] The partnership had been, until very recently, a long-standing and happy one in which each partner professes to have trusted the other implicitly.

[11] There were some disputes in the evidence between Mr Burcher and Mr Short, particularly as to the level of involvement of Mr Short in the affairs of the nominee company and his knowledge of investments relating to his client investors.

[12] Somewhat unfortunately, a very lengthy and comprehensive affidavit sworn by Mr Short approximately one month before the hearing was not served on Mr Burcher nor his counsel (both of them were out of New Zealand at the time).

[13] Despite a number of promises, at pre-trial conference stage, to file evidence and a formal notice of response to proposed amended charges, by the date of the hearing Mr Burcher had not done either. Thus the Tribunal asked for him to give oral evidence, in part to allow him an opportunity of responding to some of the matters deposed to by Mr Short. There were also letters annexed to Mr Short's affidavit from former staff members, which gave a somewhat different picture of the management style of Mr Burcher than his own references. Mr Burcher was given the opportunity of refuting these which he very firmly did in his oral evidence.

[14] Since the hearing proceeded as a penalty hearing only and *viva voce* evidence was only heard from Mr Burcher, we are not fully able to make firm findings in relation to the disputed matters. With that caveat however, we do consider that Mr Short has somewhat minimised his involvement in the nominee company management and overstated any difficulties he might have experienced in carrying out his governance obligations in a proper manner. We say this because we accept the evidence, there being none to the contrary, of Mr Burcher that the full nominee company records of

authorities, valuations and other supporting documents were kept in the reception area, fully accessible to all partners.

[15] The inspection which led to Maffey 1 was initiated after a complaint from the daughter of a deceased client of the firm, who had had a significant investment of over $500,000 in the nominee company. The daughter, as one of the beneficiaries of the estate complained when, following the global financial crisis ("GFC"), a number of the investments which had been made by her late mother proved to be poor ones which fell into default.

[16] We accept the submission made on behalf of Mr Short and Mr Burcher that some of the valuations received by the firm from reputable valuers were overly optimistic; one was even described by counsel as "fraudulent".

[17] The investments of the estate, in which the complainant is interested, have now all been realised, with a shortfall of $50,000. On the positive side, significant (penalty rate) interest has been recovered for the estate.

[18] Since the GFC, Mr Burcher and Mr Short have been working very hard to recover their clients' investments. This has involved a great deal of unbilled time and stress. However, they did not pay sufficient attention to the identified deficiencies in their compliance with the rules set out in Maffey 1, received by them on 3 December 2012. As a result, 53 breaches of various rules occurred after that time. We note that Mr Katz QC submits the figure is only 41. We think that the discrepancy is perhaps explained by the fact that Mr Katz has calculated from the date when the partners had time to digest fully the report early in the new year of 2013.

[19] In any event they were, and in particular Mr Macdonald and Mr Short, horrified to receive Maffey 2, in mid-2014. A decision was taken to wind down the nominee company and realise, on a staged and careful basis, all of the investments. Our impression is that lending had been decreasing over the previous year in any event and it is Mr Burcher's evidence that none of the investments of 2013 and early 2014 before the decision to wind up was made, have caused any problems and have all been repaid.

[20] After the decision was made to wind down the nominee company, the firm made the very responsible decision to engage Mr Bob Eades, a very senior and respected Auckland practitioner, to oversee that winding down.

[21] It is apparent that the wind down has, on occasion, involved the substitution of the partners' personal funds in order to release investments to clients.

Nature of the breaches

[22] The charges and supporting particulars for all three practitioners run to 60 pages, thus we shall attempt to summarise them as follows. For the period between 1 January 2006 and 1 August 2008 the rules governing nominee companies were the Solicitors Nominee Company Rules 1996 ("SNC Rules"). For the period from 1 August 2008 the rules for nominee companies are the Lawyers and Conveyancers Act (Lawyers: Nominee Company) Rules 2008 ("LNC Rules"). The further applicable rules between 1 January 2006 and 1 August 2008 are the Rules of Professional Conduct for Barristers and Solicitors ("RPC") and post 1 August 2008 the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("LCCC Rules") and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 ("TA Regs").

[23] Breaches are established in relation to all four sets of rules. These relate to: failures to provide information in the required form to investors regarding lawyers' fees; failure to provide accurate valuation information; failure to provide details of mortgages or encumbrances that ranked in priority to the investment; failure to ensure all trustees who were investors signed specific authorities rather than one trustee; failure to ensure that all specific authorities by investors were dated; failure to ensure that all specific authorities were signed before the investment was made; failure to ensure that specific authorities were not signed solely by lawyer trustees; failure to ensure that all investments were made in accordance with a specific authority and/or that all specific authorities were maintained and readily available for inspection; failure to obtain specific authority before increasing a principal sum; failure to ensure that all valuations provided complied with the requirements of the SNC and LNC Rules; failure to provide sufficient written information concerning default action to investors and consequent failure to take into account the advisor instruction of the investors in relation to appropriate default action; failure to protect

and promote the interests of the investor clients to the exclusion of the borrower clients in relation to defaults; failure to ensure the clients were advised of a conflict of interest at this point and advised to take independent advice; continuing to act in the face of a conflict of interest in relation to mortgage defaults; facilitating investments in mortgages in default without providing full advice to investors as to the security and nature of the fault and/or without express written authority from the investors prior to the investment being made; overall failure to take all reasonable steps to ensure that the nominee company complied with the SNC and LNC Rules respectively. And for Mr Burcher, as trust account supervisor, failure to notify the Law Society of non-compliance with the Nominee Company Rules in monthly certificates provided pursuant to the TA Regs.

[24] In submissions, counsel for Mr Burcher pointed out some examples of more minor or "technical" breaches. Indeed, it is fair to record that, in his reports, Mr Maffey himself referred to some of the breaches as technical. An example of this is that some of the valuations obtained (always from reputable valuers), did not carry the proper "consent to distribution" statement. Mr Burcher quite fairly points out that if the valuation is addressed to the nominee company, then he assumed that that carried with it a consent to distribution to investors in that company. Other examples were that an authority was signed by only one trustee in a situation where the other trustee was in fact either Mr Burcher or Mr Short himself. They were also labouring under the misapprehension that a single trustee signature was sufficient for the purposes of an authority.

[25] Other breaches are significantly more serious: authorities to invest signed up to four months after the investment was made, readvances to a different entity without proper information to the client or due diligence concerning the borrower (although in most cases these were known to the firm as existing clients). The nature of default action was not fully discussed with investors, although it is accepted that the practitioners were doing their very best to recover funds for their clients.

[26] The problematic existence of an inherent (but sanctioned) conflict of interest where a nominee company operates as between clients of the firm, respectively as borrowers and investors, is highlighted by this case. Whilst of itself there is no breach of the rules until default occurs, at that point different obligations as to the conflict arise, and independent advice must be offered. But it is at precisely this time

that the practitioner may be distracted from this, by efforts to recover the funds. It is apparent that many practitioners have chosen to stop nominee company lending because of these difficulties as well as the very stringent compliance requirements.

[27] However, it is not just that there were some serious breaches in compliance by the manner in which this nominee company was conducted, it is the **volume** and period over which the breaches have occurred which is of significant concern and indeed formed the basis for the prosecutions. The number of breaches identified in Maffey 1 are 22, but in Maffey 2 188 – a total of 210. As indicated in the earlier background summary, 53 of the latter breaches occurred after the partners were on notice about the concerns raised by Maffey 1. This is where the seriousness of this offending lies.

[28] The Tribunal also recognises that this nominee company had traded for many years without such difficulties emerging. Had it not been for the GFC, the non-compliance and cut corners may never have been discovered. That does not excuse the behaviour.

[29] Rules and strict compliance in the handling of client investments are there to protect the public against such adverse events occurring. That is not to say that lawyers in any way act as insurers of their clients investments, or indeed are responsible for a client's individual investment decision. They are however required to keep strictly to the professional requirements imposed on them by the rules governing the administration of nominee companies. These partners failed to do so. They have acknowledged such failure by their guilty pleas.

Approach to penalty

[30] The starting point is to identify the seriousness of the offending in the context of professional disciplinary proceedings as a whole. Having done so, when practitioners are jointly charged as here, it is necessary to identify the varying levels of culpability.

[31] The Tribunal must then consider and weigh any aggravating features and mitigating features. Finally, to ensure consistency, the Tribunal must consider penalties imposed in similar cases in the past.

Seriousness of offending

[32] The sheer volume of breaches and the period over which these breaches occurred make this serious offending, as acknowledged in the pleas of the practitioners to negligence of such a degree or frequency as to tend to bring the profession into disrepute. And misconduct also, in the case of Mr Burcher.

[33] It is submitted, and largely accepted, that there is no dishonesty involved in the non-compliance and certainly no intention for personal benefit. Having said that, in Mr Burcher's case it has to be recognised that in signing monthly certificates certifying to the New Zealand Law Society that he was satisfied that the practice had complied with any practice rules relating to lawyers nominee companies, Mr Burcher represented to his professional organisation a position which was patently untrue. Although it might have been inadvertent, it was an error which was repeated a number of times. Mr Burcher has pleaded guilty to misconduct, that is the most serious level of professional offending. We accept that this, properly, recognises his additional failings as a partner not only responsible for the day to day running of the nominee company but also as the partner with the assigned responsibility to supervise the trust account and report to the New Zealand Law Society about it and the nominee company.

[34] Mr Maffey in his second report, when referring to the significant losses of both capital and interest for investors in the nominee company, had this to say:

> "While I accept that this is partly attributable to the Global Financial Crisis and the general downturn in the property market around 2008 to 2009, some of it must also be attributable to poor lending decisions initially, overly optimistic valuations, exceeding first mortgage recommendations (permitted by the Rules but not advisable) and having too great a portion of the loan portfolio advanced to one group of associated borrowers."

[35] Prior to the receipt of Maffey 2, Mr Eades had noted, in relation to the Maffey 1 defaults, that the firm's shortcomings were "well down the scale". He noted that, in respect of the complainant Ms A, the firm had offered to "make good" and that the non-compliance had not "in themselves caused more loss to the investors".

[36] It is not clear that Mr Eades would, in the face of the subsequent defaults identified in Maffey 2 hold to the view that the overall offending is "down the scale".

[37] We consider the conduct, while not dishonest, to be relatively serious having regard to the risk to the profession's reputation, were the public to know of the scale and duration of the non-compliance. This is exacerbated, in Mr Burcher's case, by the checks and balances of monthly reporting to the New Zealand Law Society, not having achieved their purpose because of the false assertion that rules had been complied with when they had not.

Relative culpability

[38] In terms of relative culpability Mr Burcher plainly accepts the major responsibility in this matter. However he was at pains to point out that throughout the relevant period Mr Short was also involved in nominee company matters and in referring clients for lending and borrowing, and thus he does not consider that he ought to stand alone or be the only person seen as responsible for the charges now faced.

[39] For his part Mr Short expresses his acceptance of guilt on the basis of strict liability. However, we do not entirely accept his contention that he was so divorced from the running of the nominee company that he was not able to exercise better governance than was demonstrated.

[40] While we accept that Mr Macdonald was the litigation partner and certainly distant from the running of the nominee company, he too has to accept responsibility as a director of that company, which was managing large sums of money on behalf of others. He failed in his obligation to ensure that the company was being run properly and in accordance with all of its compliance regulations.

[41] Clearly penalty must reflect these different levels of culpability. We propose to achieve this by taking an overall view of penalty, including the awarding of contributions towards the costs of prosecution and of the Tribunal, in a way which assures the totality of penalty is also proportionate to culpability and to the following factors.

Aggravating features

[42] We do not consider there to be any aggravating features which relate to Mr Macdonald. However, in respect of Mr Short and Mr Burcher, both of whom face charges arising out of Maffey 1, the numerous breaches of regulations after December 2012 are clearly an aggravating feature.

[43] Both Mr Short and Mr Burcher have one previous finding of "unsatisfactory conduct". In Mr Burcher's case this related to stale trust account balances, thus, at the lower end of the scale and not a seriously aggravating feature.

[44] In Mr Short's case the previous finding disclosed a somewhat concerning lack of understanding about conflicts of interest, but was a matter where the practitioner had put things right with the client. Given that Mr Short is now retired and will not be holding a practising certificate we see no need to comment further on the conflict issue.

Mitigating features

[45] All three practitioners have fully co-operated with the Law Society investigation at all stages. The inspector commended them for their co-operation and openness in access to their records and speedy acknowledgement of their failings.

[46] All three practitioners have also co-operated in the process of prosecuting these charges and, in Mr Short's case at least indicated a willingness to negotiate a plea at a relatively early stage. Mr Macdonald also indicated a plea some time in advance of the allocated hearing and then Mr Burcher also reached an agreement concerning amended charges and pleas with the Standards Committee over a month in advance of the hearing, so that a defended hearing did not have to be fully prepared. The practitioners deserve considerable credit for this approach.

[47] A further mitigating feature is the manner in which the practitioners have assiduously worked to wind up the nominee company (with the assistance of Mr Eades) and return, as far as possible, the investment funds to their clients. We are satisfied they have spent some hundreds of hours in this endeavour.

[48] The partners have also replaced a number of investments with funds of their own, in the order of $500,000. While this is money which may well be returned to them in due course, it would appear that they have taken on some of the less viable investments and they deserve some credit for those actions.

[49] All three practitioners have provided references which attest to their long and committed service to the profession and their clients. All three have enjoyed enviable reputations and are clearly distraught at this fall from grace, particularly Mr Short, who has retired in the midst of the mayhem caused by the nominee company problems and winding up.

[50] In Mr Burcher's case, some letters have been provided from former staff members and one or two clients, which certainly detract from the positivity and strength of the references. However, we note that only a handful of investors have seen fit to complaint about his actions, of a total of 170, and thus we do not give great weight to the "negative" references.

Other decisions concerning negligence and misconduct

[51] As is often the case, a number of authorities have been put before us, none of which are on all fours with the present case. The closest is the *Waikato Bay of Plenty Standards Committee 2 of the New Zealand Law Society v A.*[3] However in that matter the scale of offending was much more restricted (and without the aggravating features), and the Tribunal approved an agreed schedule of penalties including a censure, fine and significant costs, with the practitioner undertaking not to be involved in the management of a nominee company for five years.

[52] In the present matter, while the parties largely agree that there ought to be a censure of each practitioner, and a contribution to reasonable costs, and a fine in respect of Mr Macdonald, there is disagreement as to whether Mr Short ought to be suspended as is sought by the Standards Committee, and as to the length of the suspension for Mr Burcher (he having conceded in the course of the hearing that suspension was inevitable).

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[3] *Waikato Bay of Plenty Standards Committee 2 of the New Zealand Law Society v A* [2014] NZLCDT 70.

[53] The Standards Committee seeks a 12 month suspension for Mr Burcher and a three month suspension for Mr Short.

[54] Mr Katz has helpfully provided a number of overseas authorities to support his submission that suspension is not necessary to achieve the purposes of penalty (as set out in *Daniels*[4] and *Fendall.*[5]*)*

[55] We accept the dicta, and in particular, that a proper and responsible approach by a practitioner may be taken into account in determining whether suspension is necessary for the protection of the public and upholding of the profession's reputation (*Fendall*).[6] We also accept the principle of the least restrictive intervention as enunciated in *Daniels*.[7]

[56] We do consider that, in the case of Mr Short, the decision of *Davidson*[8] is somewhat analogous. While we accept that there was a criminal (strict liability) conviction in that matter and that enormous loss of public funds was involved, the practitioner's culpability arising out of poor governance is on point. At paragraphs [141] to [143], reflecting back to the comments in *Bolton v Law Society*[9] His Honour noted at paragraph [142]:

> "[142] In all the circumstances of this case I do not consider that a censure was a sufficient penalty so as to maintain the public's confidence in the profession's discharge of its obligation to discipline its members. While with respect I do not consider that in New Zealand an order less severe than one of suspension is only appropriate in a very unusual and venial case, I do not view the present case as one where an order less than suspension should be entertained.
>
> [143] However I do not consider that a period of suspension of 12 months as sought by the ASC3 is appropriate. In my view an order for suspension for nine months will suffice to indicate the profession's concerns and will provide a degree of confidence for the public as to the integrity of the disciplinary process while at the same time also reflecting the several mitigating factors which are summarised in the sentencing notes of Andrews J."

[57] Mr Katz referred us to that passage in *Daniels*[10] which says:

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[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[5] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825, Wylie J.
[6] See above n 5.
[7] See above n 4.
[8] *Davidson v Auckland Standards Committee No. 3* [2013] NZHC 2315, Brown J.
[9] *Bolton v Law Society* [1994] 2 All ER 486.
[10] See above n 4 at [25].

> "The real issue is whether this order for suspension was an appropriate **and necessary** response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also to the other purposes of suspension." (emphasis added)

[58] Not only are we reminded that the misconduct (not negligence) of Mr Daniels was extremely serious and by no means comparable with the present case, we also note the rejection of the suggestion that because Mr Daniels was to cease practice there was an acceptable reason to avoid suspension. Mr Daniels' suspension for three years was upheld in the appeal.

[59] Mr Katz submits that it is not necessary, certainly for public protection, given that Mr Short has also retired, but even as a demonstration of proportionate response to the public, for a suspension to be imposed in this case. We respectfully disagree with that submission. On the basis of *Davidson* we consider that suspension is necessary to reflect the overall seriousness of the offending and to fulfil the objectives of maintaining: public confidence in the provision of legal services; professional standards and the status of the legal profession.

Decision

[60] We consider that, having regard to the foregoing factors, that the following penalties ought to be imposed and we deal with the question of costs and suppression separately. However we confirm that we have, in assessing overall penalty, taken into account the burden and thereby punitive effect of the order of costs and our ruling as to suppression.

1. We consider that, in respect of the two charges of misconduct and two charges of negligence of such a degree or frequency as to tend to bring the profession into disrepute, that a proper period of suspension for Mr Burcher is nine months. In addition we impose a censure which, along with the censure of the other two practitioners, is attached as a schedule to this decision.

2. Mr Short is to be suspended for three months and censured.

3. Mr Macdonald is censured and a fine of $8,000 imposed.

[61] We record for completeness that the decision as to suspension of Messrs Burcher and Short is a unanimous one of the five members of the Tribunal pursuant to s 244 of the LCA.

[62] We are aware that Mr Short and Mr Burcher are devoting considerable time to assisting Mr Eades with the wind up of the nominee company. As suspended practitioners they will not be able to continue as directors of that company. However we do not consider that debarment to directorship should necessarily prevent them from providing assistance where that is required. Nor should it impact on our decision to impose a period of suspension.

Compensation

[63] In respect of the first prosecution, initiated by complainant Ms A, the Standards Committee sought an order for compensation of $25,000 from each of Mr Burcher and Mr Short.

[64] Jurisdiction to award compensation is contained in s 156(1)(d):

> "Where it appears to the Standards Committee that any person who has suffered loss by reason of any act or omission of a practitioner or former practitioner … order the practitioner … to pay to that person such sum by way of compensation as is specified in the order."

The maximum amount prescribed in the Regulations is $25,000.

[65] Whilst it is accepted that the estate in which the complainant has an interest as a beneficiary has lost investment capital in the sum of $50,000, we are not satisfied that such loss is directly attributable to the actions of these practitioners. Indeed the closest that the evidence approaches this are the quoted (in para [34]) comments of Mr Maffey, in Maffey 2.

[66] To make a proper assessment of whether the loss was occasioned by the regulatory defaults in this case would require much more significant evidence including evidence from valuers, possibly real estate agents and others. That is a matter best left to the civil jurisdiction and not assumed by this Tribunal. We have already recorded our acceptance of the submission that practitioners are not insurers of their client's investments. We note that this approach is consistent with that taken

by the Tribunal in the *Waikato Bay of Plenty Standards Committee 2 of the New Zealand Law Society v A*.[11]

[67] For those reasons we decline to make an order for compensation.

Costs

[68] The Standards Committee have claimed costs in the sum of $84,222.96. Although the matter occupied two days of hearing, it proceeded as a penalty only hearing, with no requirement for Standards Committee witnesses or proof of the charges.

[69] The practitioners, while conceding that they ought to bear, proportionate to culpability, the reasonable costs of prosecution, object to the quantum in this matter.

[70] This has been a significant prosecution; proceeding as it has with joint charges against first two, and then later three practitioners under two separate sets of proceedings. However, we accept the submission of counsel for Mr Burcher, that the evidence itself was straightforward, based as it was on the two comprehensive reports of the Law Society Inspector.

[71] We consider in this instance and having regard to the constructive approach adopted by the practitioners, that we ought to fix reasonable costs of the prosecution in the sum of $65,000, namely $40,000 in respect of the LCDT 019/14 prosecution and $25,000 in respect of the LCDT 009/15 prosecution.

[72] We consider the proper apportionment of those costs to the practitioners ought to be as follows: for Mr Burcher $25,000 (LCDT 019/14) plus $11,000 (LCDT 009/15), a total of $36,000 costs.

[73] For Mr Short the sum of $15,000 (LCDT 019/14) plus $8,000 (LCDT 009/15), a total of $23,000 costs.

[74] For Mr Macdonald costs of $6,000 (LCDT 009/15).

[11] See above n 3 at [16].

[75] In relation to the Tribunal s 257 costs these will be ordered against the New Zealand Law Society but that each practitioner reimburse the New Zealand Law Society in the following proportions – half the Tribunal costs to be reimbursed by Mr Burcher, one-third by Mr Short, and one-sixth by Mr Macdonald.

Name suppression

[76] Mr Burcher does not seek name suppression; however it has been sought on behalf of Mr Short and Mr Macdonald respectively.

[77] An interim name suppression order had been granted for Mr Burcher and Mr Short, at an earlier stage when the charges were defended, on the basis of evidence provided by them concerning the risk of reputational damage and its impact on the realisation of the investments in the nominee company. The interim name suppression order was later extended to include Mr Macdonald.

[78] While there was also a ground advanced as to family members sharing the same name, we noted in our interim decision that was given little weight. That is really the only ground remaining and we consider, having regard to the decision in *Eichelbaum* that it is insufficient in the present matter to displace the starting point of openness contained in s 240 of the LCA. There is simply insufficient evidence to justify a finding that the interests of the practitioners and their families prevail over the interests of the public in the full understanding and openness of disciplinary proceedings.

Summary of orders

Timothy John Burcher

1. The practitioner is suspended for a period of nine months commencing 23 December 2015, ss 242 and 244.

2. The practitioner is censured pursuant to s 156(1)(b) and s 242(1)(a).

3. The practitioner is to pay costs of the prosecution in the sum of $36,000, s 249.

4. The New Zealand Law Society is to pay the s 257 costs of the Tribunal which are certified in the sum of $14,317.

5. The practitioner is to reimburse the New Zealand Law Society for 50% of the s 257 Tribunal costs.

David Gould Russell Short

1. The practitioner is suspended for a period of three months commencing immediately, ss 242 and 244.

2. The practitioner is censured pursuant to s 156(1)(b) and s 242(1)(a).

3. The practitioner is to pay costs of the prosecution in the sum of $23,000, s 249.

4. The practitioner is to reimburse the New Zealand Law Society for one-third of the s 257 Tribunal costs.

Ronald John Macdonald

1. The practitioner is censured pursuant to s 156(1)(b) and s 242(1)(a).

2. The practitioner is to pay a fine to the New Zealand Law Society in the sum of $8,000, s 242(1)(i).

3. The practitioner is to pay towards the costs of prosecution the sum of $6,000, s 249.

4. The practitioner is to reimburse the New Zealand Law Society for one-sixth of the s 257 Tribunal costs.

Censure

[79] It may be thought that a specific censure is unnecessary when a harsher penalty of suspension has been imposed because that of itself is censure enough. This Tribunal, in this case, has decided that each of the practitioners should be separately censured as a mark of disapproval on behalf of members of the public and the profession of the behaviour of the practitioners. Such censures will remain always a part of the individual practitioner's disciplinary record and may serve as a deterrent to others.

[80] Mr Macdonald, you were a partner in a firm that chose to incorporate a nominee company and through that company managed many millions of dollars worth of contributors' funds. Of necessity you were a director of that nominee company but you did nothing that a company director should have done. In the firm you were the litigation partner but that role does not absolve your responsibility as a director of a company managing large sums on behalf of others to ensure that proper processes were followed and that the rules designed to give protection to those contributories were properly observed. Your failure to do so deserves censure to remind you of your obligations for the future. You are censured accordingly.

[81] Mr Short, until about fifteen years ago you had the primary role in the management of your nominee company. When you relinquished that role in favour of Mr Burcher your involvement diminished but was still active because many of the contributories and borrowers were your clients historically. You were aware of the rules because you had worked with them before Mr Burcher's involvement yet you seem not to have followed those rules as a director responsible to do so, preferring instead to leave the management largely to Mr Burcher. That failure has led to your present situation at the end of what has been a long and essentially unblemished career. Your failure though cannot go unmarked. The public and the legal profession are entitled to expect compliance with rules and for non-compliance to be marked with disapproval. You are censured accordingly.

[82] Mr Burcher, your guilty plea to two misconduct charges and two negligence charges marks you as the most culpable of the three defendants. That culpability is reflected in the level of the other penalties imposed compared to your co-defendants but nevertheless you too must be censured. You had the practical responsibility of

the management of the nominee company and thus the compliance with the relevant rules. Your compliance failures cannot be excused as occasional minor technical non-compliance because the number of failures was so great. Members of the public and the profession are entitled to expect such failures to be marked by disapproval in the form of a censure by the Tribunal charged with ruling on professional disciplinary matters. Mr Burcher, you are censured.

DATED at AUCKLAND this 18th day of December 2015

Judge D F Clarkson
Chair