

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2016] NZLCDT 5

LCDT 016/15

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 4**

Applicant

AND

DONALD BRUCE THOMAS

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms S Fitzgerald

Ms F Freeman

Mr W Smith

Mr B Stanaway

HEARING at Specialist Courts and Tribunal Centre, Auckland

DATE 26 February 2016

DATE OF DECISION 16 March 2016

COUNSEL

Ms C Paterson for the Applicant

Mr G Illingworth QC for the Respondent

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

[1] The respondent was charged by the applicant with one charge (and three alternative charges) under the Lawyers and Conveyancers Act 2006 (the Act).

[2] The respondent admitted that his conduct amounted to a reckless breach of the Rules of Professional Conduct in that he allowed money held in trust for a client known as the Jeannine Patterson Family Trust ("JPFT") to be applied towards the purchase of a property for the JPFT.

[3] He admitted that, in doing so, he acted on the instructions of only one of the two trustees of the JPFT.

[4] The applicant sought and was granted leave to withdraw the remaining three charges.

[5] A penalty hearing occurred on 26 February 2016 at which the Tribunal imposed the following orders:

- (a) Censure;
- (b) Payment of compensation to the complainant of \$2,898.20;
- (c) Payment of the costs of the New Zealand Law Society of \$10,907.03;
- (d) Refund to the Law Society the Tribunals Costs which are fixed at \$2,101.

[6] It reserved its reasons for the penalty imposed. This decision now records those reasons.

Background

[7] Mr and Mrs Patterson were the two trustees of the JPFT. They had separated and were negotiating division and settlement of relationship property through their respective solicitors. The home in which Mrs Patterson and the children were living following separation was sold. Mr Patterson agreed to half of the sale proceeds being held in trust for the JPFT. The other half was paid to the Mark Patterson Family Trust for whom Simpson Western were the solicitors acting.

[8] Mrs Patterson then found a property for the family to move into and entered into an unconditional agreement to purchase it. Mr Patterson then refused to join in the authorisation required to use a portion of the funds in the JPFT trust account with the respondent's firm to complete the purchase. His refusal put the JPFT at risk of forfeiting the deposit on the property and other consequences for not proceeding with the purchase.

[9] An application was made to the Family Court seeking an order for the release of the funds. The Court held that it did not have jurisdiction in respect of trusts and that the matter would have to be the subject of an application to the High Court. It accordingly dismissed the application and made an award of costs of \$1,500 in favour of Mr Patterson. The presiding judge observed that Mr Patterson was "playing hardball".

[10] Mrs Patterson gave instructions to the respondent to use the funds held for the JPFT to complete the purchase of the home, the agreement for which had become unconditional and with settlement due imminently.

[11] The respondent then did so without obtaining the consent of the other trustee Mark Patterson.

[12] Mr Patterson claims to have suffered loss as the result of the respondent's conduct and seeks compensation in excess of \$200,000.00 the greatest part of which is said to be for loss of bargaining power. His refusal to authorise the release of the funds in the JPFT was motivated by his desire to achieve a global settlement of all relationship property the majority of which was under his control.

Submissions

[13] Counsel for the Committee submitted that the appropriate orders to make were:

- (a) Censure;¹
- (b) A short period of suspension;²
- (c) Compensation;³
- (d) Payment of the Committees costs; and
- (e) Reimbursement of the Tribunal's costs.

[14] Counsel submitted that the following factors were relevant to the making of the orders that were asked for:

- (a) The respondent allowed trust money to be released from the JPFT and in doing so was aware that he risked being in breach of s 110 of the Act and reg 12(6) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2006;
- (b) He knew of the lack of the consent of one of the trustees;
- (c) Had failed in an application to the Family Court to have the funds released and;
- (d) Released the funds knowing that Mr Patterson wanted a global settlement of relationship property and was not going to change his attitude;

¹ Section 156(1)(b) of the Act.

² Section 242(1)(e) of the Act.

³ Section 156(1)(d) of the Act.

- (e) His misconduct called for a deterrent penalty of a period of suspension having regard to a focus on consumer protection and regard for the public interest.

[15] The Committee noted that the respondent had a finding against him in 2001 of conduct unbecoming. It submitted that there should not therefore be a reduction of penalty on the ground of previous good character or for having an unblemished disciplinary history.

[16] The Committee accepted that the period of suspension which it asked for should be reduced in light of the respondent having acknowledged his wrongdoing and accepting responsibility for it.

[17] Counsel for the respondent submitted that the respondent had acted with the best of motives but with a flawed methodology. He had convinced himself that where a trustee was acting in flagrant breach of his obligation as a trustee, for his own personal gain, he was disqualified from acting in that office as trustee in respect of the relevant decision. He proceeded to complete the purchase of the property on behalf of the JPFT. By doing so the respondent effectively took matters into his own hands. He has accepted that the proper course was to apply to the High Court for removal of Mark Patterson as a trustee.

[18] Counsel acknowledged that the starting point for the consideration of penalty was a short period of suspension of six to eight weeks but submitted that the following factors of powerful mitigation should be taken into account:

- (a) The 40 year period that the practitioner has been in practice in West Auckland where he has built an impressive reputation, supported by references produced to the Tribunal.
- (b) The prior adverse finding of 2001 should not weigh against a penalty less severe than suspension. It was a relatively minor matter in a professional career spanning 40 years and should not be held to prevent the Tribunal giving full weight to his otherwise exemplary record.

[19] Counsel for the Committee referred to cases where a period of suspension was imposed in each case and submitted that on the basis of those cases a period of suspension of the respondent was appropriate in the respondent's case. They are *Monckton*⁴, *Hemi*⁵, *Khan*,⁶ and *Lewis*.⁷

[20] *Monckton* is the case which we consider most closely resembles that of the respondent. In that case the Tribunal found that the practitioner *Monckton* had made a number of serious errors. The consequences of those left the family concerned with a difficult mess to unwind which had not been achieved some two years further on. The practitioner was further found to have failed to fulfil numerous duties.

[21] Those factors led to a finding of relatively serious negligence. The Tribunal took into account a career spanning 34 years which was otherwise unblemished. It imposed a period of suspension of one month along with other orders.

[22] In reaching the decision not to impose a period of suspension on the respondent we have taken into account the following matters:

- (a) His was a single event of misconduct carried out with no dishonesty or personal gain;
- (b) There were no detrimental consequences to the parties involved;
- (c) The respondent has admitted guilt from the outset and has accepted that his name should be published so that the profession can be aware of the need to comply with the strict requirements of professional conduct;
- (d) No necessity arises for the public to be protected from the respondent;
- (e) Deterrence to the extent required to uphold the principles and purposes of the Act particularly as to the maintenance of public confidence in the

⁴ *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.

⁵ *Canterbury-Westland Standards Committee No. 3 v Hemi* [2013] NZLCDT 23.

⁶ *Auckland Standards Committee 5 v Khan* [2014] NZLCDT 15.

⁷ *Canterbury Westland Standards Committee 3 of the New Zealand Law Society v Lewis* [2015] NZLCDT 18.

provision of legal services by upholding high professional standards has been accepted by the respondent by ready acknowledgment of fault and remorse for his conduct;

- (f) His long career without otherwise significant blemish and the standing he has in his community.

Compensation claim of the complainant

[23] The complainant's claim for compensation for loss of bargaining power has been strongly resisted by counsel for the respondent for the reason that to so order would be to reward Mr Patterson for acting in breach of his most fundamental obligation as a trustee and for failing to comply with his disclosure obligations in respect of relationship property.

[24] Counsel for the Committee did not actively pursue the issue given that it is contentious and speculative.

[25] We have considered it inappropriate to make an order.

[26] Both counsel have agreed that the complainant should have a refund of \$2,898.20 which is the total of costs and disbursements he incurred for legal fees after becoming aware that funds had been released without his authority.

Summary of orders

1. The respondent is censured;
2. The respondent is to pay compensation to the complainant totalling \$2,898.20;
3. The respondent is to pay the costs of the Standards Committee which are fixed at \$10,907.03;

4. The respondent is to refund to the New Zealand Law Society the costs of the Tribunal payable by it pursuant to s 257 of the Act and fixed in the sum of \$2,101.

We record a formal censure

Mr Thomas – Your reckless conduct merits censure. It was by a fine margin that a period of suspension from practice was not imposed on you. You have significantly let yourself and the profession down. It is critical that in times of stress and pressure a practitioner remembers and acts in accordance with his duties and role. Your duty and role was clear, as you have properly acknowledged by your approach to the charges.

You allowed your judgment to be clouded by your frustration at the stance being taken by the co-trustee. You were aware that the funds could not be paid out on the instructions of one trustee only, and sought orders from the Family Court in order for that to occur. In light of the jurisdictional issues noted by that Court, you were similarly aware that High Court orders would be required to enable payment. You chose not to go there. Instead you convinced yourself that you could legitimately proceed without the co-trustee's authorisation. It was the Tribunal's concern that you may have applied some *ex post facto* reasoning to justify the actions taken.

In all the circumstances, your conduct amounted to a serious failing on your part for which you are properly censured.

DATED at AUCKLAND this 16th day of March 2016

BJ Kendall
Chairperson