BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 70

LCDT 011/14

BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 2 OF THE NEW ZEALAND LAW SOCIETY** Applicant
AND	**A PRACTITIONER** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms C Rowe

Mr P Shaw

Mr B Stanaway

HEARING at Auckland

DATE 13 November 2014

COUNSEL

Mr L Clancy for the Standards Committee

Mr G Illingworth QC and Ms K Harkess for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING COMPENSATION AND NON-PUBLICATION OF NAME AND PARTICULARS

[1] At a hearing of the Tribunal on 13 November 2014, the practitioner admitted two charges of negligence in the practitioner's professional capacity of such a degree as to tend to bring the profession into disrepute, under the Law Practitioner's Act 1982.

[2] The Tribunal granted the Standards Committee leave to withdraw charges of misconduct relating to the alleged wilful or reckless breach of the Solicitors Nominee Company Rules 1996 ("SNCR") and the Rules of Professional Conduct for Barristers and Solicitors ("RPC"), and charges of conduct unbecoming a barrister or solicitor.

[3] The admissions followed agreement being reached between counsel as to the penalty to be sought. The Tribunal considered the proposed penalties and satisfied itself that they were appropriate and imposed the following:

(a) An order for censure.

(b) A fine of $3,000 on each charge.

(c) An order for the practitioner to pay $27,000 being 75% of the Standards Committee Costs.

[4] The practitioner undertook not to be involved in the management or operation of any nominee company for a period of five years.

[5] The issues between the parties are whether orders for compensation are appropriate and whether there should be a permanent order prohibiting publication of the practitioner's name.

[6] The factual background to the issue of compensation is that in 2005 and 2006 the practitioner acted for a client who was interested in investing in second mortgages in order to obtain the higher interest rates available on such investments.

[7] In 2005 and 2006 the client invested sums through the practitioner's nominee company. There were three investments between September 2005 and September 2006. The loans were repaid.

[8] A fourth investment through the practitioner's nominee company occurred on 17 November 2006 in which the client concerned advanced $190,000 as a second mortgage for six months with a priority sum of $273,000. In April 2007, the mortgagor defaulted in payment under the first mortgage which constituted a default under the second mortgage. In due course the first mortgagee exercised its power of sale. It sold the mortgaged properties and recovered its mortgage and fees associated with the sale. The second mortgagee received only $1,004.46 which was the balance remaining from the proceeds of sale. The resulting loss to the second mortgagee was substantial.

[9] The practitioner admitted a failure to obtain new valuations before the fourth and final loan was made. Use was made of previous valuations. The effective date of those valuations was 23 October 2006, over a year before the date of the investment. The practitioner adjusted the valuations downwards to take into account the decline in the property market. That was not permissible because the rules do not permit a discretion to obtain an updated valuation of a valuation that is over a year old at the time of the investment.

[10] The admitted negligence of the practitioner in respect of the breaches of Rules 6.1, 7.1 and 12 of the SNCR included:

(a) Deficiencies in the specific authority documents signed on behalf of the investor/client.

(b) Deficiencies in the valuations required to be provided to the client.

(c) A failure to provide prompt written notice of default to the client.

[11] The practitioner admitted breaches of the RPC by:

(a) Continuing to act for more than one party in the same matter without the prior informed consent of the investor/client.

(b) Failing to advise the client of a conflict or likely conflict between the interests of the lender and the borrower.

(c) Failing to advise the client that it should take independent advice (and arranging that advice if required).

(d) Failing to decline to act further for a party where to act further for a party would, or be likely to, disadvantage any of the clients involved.

[12] The Standards Committee submitted that the practitioner should pay compensation of $5,000 in respect of each charge which is the maximum payable under the relevant provision of the Law Practitioners Act 1982. It submitted that:

(a) A penalty combining fine and compensation was necessary to provide general and specific deterrence, and to mark the seriousness with which the Tribunal views breaches of the rules regulating the management of solicitors' nominee companies.

(b) Careful adherence to the nominee company rules and the general rules of professional conduct is fundamental given the potential for conflict arising from the nature of nominee company transactions. Deviations should be regarded as serious and should be firmly responded to by the Tribunal even in the absence of any dishonesty or lack of probity.

(c) Ordering compensation would help mark the seriousness of the practitioner's negligence and go some way to protecting the consumer client and maintaining confidence in the profession.

(d) That although there was more than one cause of the client lender's losses, the practitioner contributed in a material way to the loss because the investment might not have been made had the practitioner complied with the rules.

(e) That if the client had been notified of the default and conflict of interest in writing in a timely manner, the client may have been able to take steps to limit its losses.

[13] Counsel for the practitioner argued that the Committee's case for compensation is flawed. He submitted that the question to determine whether or not compensation is payable is to ask "*if the correct procedure had been followed would the result have been different?"*.

[14] He submitted that there was clear evidence to show that the client did not suffer loss by reason of the acts or omissions of the practitioner. The acts and omissions were largely technical and related to deficiencies in the documentation and information given to the client before the fourth investment. These did not affect the client's decision to invest. There was no evidence that the client would not have invested in November 2006 if it had known of the technical difficulties.

[15] There was no evidence that the client would not have invested had the practitioner given it all the information required under the SNCR including a valuation report less than 12 months old at the time. The client knew that the security properties had fallen slightly in value, but was prepared to proceed and had asked for a higher interest rate for the increased risk.

[16] The Tribunal has accepted the arguments advanced by counsel and has found that there is no causal link between the loss suffered by the client investor and the acts and omissions of the practitioner.

[17] The Tribunal has had to determine whether the client suffered loss by reason of the acts and omissions of the practitioner after the loan was made. Counsel submitted that the Tribunal must consider whether the loan would have been repaid

had the practitioner not breached the SNCR default rules and/or took in relation to the conflict before 16 July 2007.

[18] He submitted that the client's investment could only have been repaid if the security properties sold for a sufficient price to repay the first and second mortgages in full. The mortgagee sale price was unconnected to the practitioner's fallings in relation to those default rules and the conflict. There is no evidence to allow the Tribunal to conclude otherwise or that the client would have done anything differently if it had received independent advice once the mortgagor had defaulted.

[19] The Tribunal has accepted those arguments which have force when it takes into account that it was the first mortgagee who controlled the sale of the security properties.

[20] The Tribunal has made no orders for compensation. It has noted that the practitioner has undertaken to pay the client $2,500 by way of reparation.

[21] The practitioner sought an order for the permanent non-publication of name and identifying particulars. The application was based solely on the interests of the beneficiaries of the particular charitable trust with which the practitioner has a close association and is its primary fundraiser. All funds raised are applied without deduction for its ongoing projects for the education, sponsorship and support of impoverished and disadvantaged children in an overseas country.

[22] The concern is that the consequences of publication of the practitioner's name will affect the trust's ability to fundraise for its projects and to continue its charitable work and assist the poor beneficiaries.

[23] It was argued that the concern is real rather than speculative. The application has the support of two independent trustees and two senior and respected New Zealanders associated with the trust and knowledgeable of the likely consequences to the beneficiaries in the country where the funds are applied.

[24] Counsel argued that the public did not need protection from the practitioner, there being no issue about honesty or probity nor any risk to the trust. Further, confidence in the profession will not be reduced by granting the order. A reasonable member of the public will appreciate that the purpose of the orders was not to protect the practitioner but to protect the interests of the vulnerable beneficiaries of the trust.

[25] The Standards Committee opposed the orders sought. It argued that public confidence in the profession required openness which extended to the practitioner's involvement as trustee of a charitable trust in that donors should generally not be denied the benefit of information as to a practitioner's disciplinary history.

[26] It further argued that concerns about the impact that publication of the practitioner's name would have on the fundraising ability of the trust was speculative and insufficient to warrant a permanent order for non-publication.

[27] The Tribunal has taken into account the practitioner's hitherto unblemished record which has extended over more than 2 decades. It has recognised that there was no lack of honesty or probity in the practitioner's acts and omissions.

[28] While there must be an element of speculation about the future ability to fundraise if non-publication is declined, the Tribunal concludes that such speculation is not fanciful. It is not unreasonable for the Tribunal to have regard to society's negative reaction to disclosed disciplinary proceedings affecting a practitioner.

[29] In reaching its decision to grant a permanent order prohibiting publication of the practitioner's name and identifying particulars, the Tribunal has applied the test as to 'proper' discussed in the recent decision of the Tribunal in respect of Mr A[1]. There it was decided that the use of the word 'proper' in s 240 of the Lawyers and Conveyancers Act signified a threshold which was 'somewhat lowered' by the use of the word 'proper' than the 'exceptional' threshold commonly used by the Courts in the civil and criminal jurisdictions.

[1] [2014] NZLCDT 23 at para [14].

[30] In summary, the Tribunal has made the orders detailed in para [3] of this decision and has made permanent orders prohibiting the publication of the name of the practitioner and any identifying particulars. It has made no order concerning the refund of the Tribunal's costs under s 257.

DATED at Auckland this 21st day of November 2014

BJ Kendall
Chairperson