

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Decision No. [2009] NZLCDT 15

LCDT 09/09

IN THE MATTER of the Law Practitioners Act 1982

BETWEEN **AUCKLAND DISTRICT LAW
SOCIETY**

Applicant

AND **EMMA JANE GARNETT**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr G Craig

Mr O Vaughan

Ms C Rowe

Mr B Smith

HEARING at AUCKLAND on 5 October 2009

APPEARANCES

Mr P Collins and M Treleaven for applicant

Mr B Hart for respondent

DECISION AS TO COSTS OF NEW ZEALAND LAWYERS
AND CONVEYANCERS TRIBUNAL

Introduction

[1] On 5 October 2009 the Tribunal considered the matter of penalty for Ms Garnett and at that stage, she having accepted the charges laid, made an order striking her name from the Roll of Barristers and Solicitors of the High Court of New Zealand. At the practitioner's request we then adjourned the matter to allow her to make further submissions as to costs and to sign a declaration as to financial means and their sources.

[2] This has now, albeit belatedly, occurred, and we take this opportunity of delivering the full decision with the background reasons for the striking off order.

[3] Charges were brought against Ms Garnett by the then Auckland District Law Society under the previous legislation, the Law Practitioners Act 1982, in August 2007. Interim suspension from practice was sought and granted in September 2007 and in November 2007 further charges were laid.

[4] Criminal charges were also brought against Ms Garnett and this process considerably delayed the disciplinary proceedings faced by her.

[5] On 4 February Ms Garnett pleaded guilty in the Auckland District Court to six counts of false accounting and two counts of using a document. She was sentenced on 6 April by Her Honour Judge Kiernan to three years' imprisonment on each of the offences. At the time of the striking off hearing in October 2009 Ms Garnett was still awaiting a Court of Appeal hearing on the issue of sentence, in which she was seeking that her sentence be reduced to one of home detention.

[6] The details of the offending which forms the same subject matter as the disciplinary proceedings before us is set out in paragraph [2] to [21] of Her Honour's sentencing notes. We do not propose to repeat these remarks. The offending involved two legal firms, in one of which she was an employee, and another in which she was an associate of the firm. For the purposes of the disciplinary proceedings the amounts were \$6,000 and \$57,365 respectively. However it can be seen from the summary of facts in the criminal proceedings that the misappropriation from one of the firms substantially exceeded the amount referred to in the disciplinary charges because the stolen amount referred to for one firm was \$188,586 and the amount sought in reparation significantly more again.

[7] Paragraph [21] of the District Court decision reads:

“Just to clarify that amount in respect of the first law firm, the figure put forward by the Crown is \$241,583.81 and to the second law firm \$33,554.48.”

[8] Some of the matters raised in mitigation on sentencing before Her Honour were repeated before us by Mr Hart. For example the dissociative state alleged to have been present during the offending. There are a number of matters in Her Honour's sentencing notes to which we wish to refer because they are relevant to these proceedings.

[9] We were disappointed that Ms Garnett did not personally appear before the Tribunal for her sanctioning hearing; and merely providing a doctor's certificate indicating that one of her children was unwell. That together with the calibre of the Declaration of Financial Means and their Sources, which was filed on her behalf, and which can only be described as derisory of the process, indicate to the Tribunal that Ms Garnett is not interested in any way in making amends to her chosen profession and former colleagues.

[10] However on sentencing it is noted that Ms Garnett did express remorse and regret as to what she had done, especially to those people who had supported her personally and professionally.

[11] The learned District Court Judge took account of the loss of career which would inevitably follow Ms Garnett's actions, which would be a significant penalty in itself.

[12] Notably Her Honour did find that Ms Garnett's remorse was:

“... heavily qualified I feel, by your lack of recall of this offending, and your lack of acknowledgement of receiving the large amounts of money that you took.”

[13] In terms of aggravating features of the offending, and significant for the purposes of this Tribunal's deliberations, is the fact that, from a position of trust, Ms Garnett conducted this offending over a five-year period.

[14] The premeditation and planning that went into the offending was referred to by the learned Judge on sentencing and of course is a matter which weighs heavily with this Tribunal.

[15] That there could be no question of a penalty short of striking off it was apparent to all, including the practitioner who, through her counsel, did not resist the order striking her from the roll.

[16] As set out in submissions of counsel for the Law Society, the gross breach of Ms Garnett's privileged status as a lawyer included: “(a) Preparation of falsified trust accounting and banking documents; (b) False notation of transactions that were plainly intended to deceive or conceal, for example; reference to “commission”, “advanced funds”, and references to client's names “funds to you” in conjunction with her own bank account number; and (c) a substantial element of personal gain – including on one occasion the funding of her own honeymoon.”

Costs

[17] Because this is a matter continued under the transitional provisions of the new Act it must proceed pursuant to s.352, as if the Law Practitioners Act had not been repealed. Thus we consider there is no jurisdiction to make an award for reimbursements of the cost of the Tribunal pursuant to s.257.

[18] In terms of costs sought by the Law Society these amount to \$15,590. We accept the submission of counsel for the Society Mr Collins that the matter has been considerably delayed by the practitioner, particularly because of the criminal proceedings. It is submitted that the legal profession ought not to have to bear the costs of proceedings properly brought for the protection of the public but it is conceded that the practitioner's personal circumstances must be taken into account to determine quantum of any costs orders (*Kaye v Auckland District Law Society* [1998] 1 NZLR 151, 157 (HC)).

[19] Despite the numerous delays, Ms Garnett's counsel, still sought to delay the 5 October proceedings further, and on the last working day prior to the hearing sought an adjournment. The reason for refusal was recorded in our earlier decision. We directed that time that Ms Garnett was to have until 12 October 2009 to file submissions in response to the cost schedules provided by the Society and that her submissions were to be accompanied by a Declaration of her Financial Means and their Sources.

[20] On 16 November no submissions were received but an affidavit from Ms Garnett setting out what she describes as her financial means and their sources was filed. This sets out her total income in the 52 weeks covered by the declaration as \$84. In the same period she declares hire purchase payments made up of approximately \$8,500 and total expenses for the year in the sum of \$10,400. It is impossible to give such a document any credibility. Sadly, as earlier indicated, this signified to us a significant lack of remorse and significant failure to take responsibility in terms of her relationship to her now former profession and colleagues.

[21] In response to this document, counsel for the Law Society asks that an order be made and that the Society have the opportunity then to come to some payment arrangement with Ms Garnett. We consider that to be a proper approach in the circumstances. Given her protracted and deliberate offending there is no reason why all the costs of protection of the public by removing her from the Roll ought to be borne by the profession. At some stage they ought to be able to recover a contribution from Ms Garnett even if that takes a number of years given the sentence

imposed on her. However we are realistic as to her future employment prospects and therefore will order only a contribution to the costs. This will be in the sum of \$8,000.

DATED at AUCKLAND this 3rd day of December 2009

Judge D F Clarkson
Chairperson