NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 4

LCDT 002/2009

IN THE MATTER	of the Law Practitioners Act 1982
BETWEEN	**CANTERBURY DISTRICT LAW SOCIETY**
AND	**GARY DOUGLAS HORNE**

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr L Cooney
Mr P Radich
Mr M Gough
Mr A Lamont

HEARING at CHRISTCHURCH on 22 April 2009

APPEARANCES

Mr P Whiteside for appellant
Mr R Raymond for respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] Mr Horne has admitted the charge, which has been made by the Complaints Committee of the Canterbury District Law Society, that he is guilty of misconduct in his professional capacity in that without authority from Steven Tall he paid from his trust account $50,000 belonging to Steven Tall to Clegg and Co Finance Limited on 5 November 2007. The charge is admitted, and for that reason we propose to only give a brief recitation of the facts.

[2] The $50,000 was borrowed from Clegg and Co by Mr and Mrs Tall. It was borrowed for a six month period in March 2007 with interest payable in advance, so the advance was less than the $50,000. Mr Horne, as Solicitor for Mr and Mrs Tall, was instructed to prepare and register a mortgage to secure the advance. Through an oversight in his office the mortgage was not registered. The client, it would seem, sought to exploit this oversight by incurring further indebtedness in relation to that property (without Mr Horne's knowledge). A caveat was registered against the property which secured the additional borrowings. So on settlement of a sale of the property in August there were insufficient funds to meet the Clegg debt.

[3] The client had pointed out to Mr Horne that in fact the debt did not fall due until 7 September 2007 in any event and did not seem concerned about the non-payment which clearly troubled Mr Horne who will have felt exposed through the oversight to register the Clegg mortgage. A subsequent sale of another of Mr Tall's properties was settled on 5 November 2007. Without Mr Tall's specific authority, Mr Horne repaid the Clegg debt from those sale proceeds and advised his client afterwards. In other words, he presented his client with a fait accompli.

[4] Mr Tall when told of Mr Horne's actions was extremely upset that by making this repayment Mr Horne had prevented him from utilising the funds in other ways.

[5] Now, whilst the Tribunal accepts that the client in an opportunistic way had sought to exploit the failure to register the mortgage by securing further borrowings

and wanting to delay repayment, clearly this was an action which breached the Solicitor's Trust Account Rules and this breach was admitted by Mr Horne at an early date.

[6] It is clear that Mr Horne was behaving, in what might be described as a paternalistic way rather than a dishonest way in this transaction, but his client was most unhappy and complained to the Law Society. Within a month of that complaint Mr Horne sought advice himself and from his own funds repaid the $50,000 directly to his client. This has not, to date, been reimbursed by the client.

[7] We reject the Law Society contention that there is also the possibility that Mr Horne was repaying a debt of Mr and Mrs Tall, with Mr Tall's sole funds. We consider that the relationship property agreement, although poorly drafted, cannot leave that as a possibility, and clearly the liability was Mr Tall's alone. So the matter was not aggravated or complicated by that factor in our view.

[8] Thus, moving to the issue of penalty; the Society seeks strike off for this very serious misconduct, and in considering penalty we regard the aggravating features as follows:

[a] Firstly, this was a deliberate action on the part of the practitioner knowing his client would disapprove. It is clear from the evidence that the Tribunal has heard today that Mr Horne had suffered some growing disquiet about his client's property transactions and financial situation generally, and he has not sought to disagree with the evidence of Mr Tall, to the effect that when confronted with the payment he simply said to Mr Tall that it was too late, he had done it and he did not put it to him first because he thought he would not agree with it. So clearly this was a deliberate and thought through action.

[b] Conflict of interest- Mr Whiteside, for the Society, quite properly puts the proposition that it is not for a solicitor to decide which of his client's debts ought to be repaid in preference to which others, and that there must have been some element of conflict of interest and self-interest in this particular debt being treated in this way by Mr Horne. Whilst we accept that there was no dishonest intent whatsoever and no direct or dishonest gain, we

> cannot discount the influence on his actions of wishing to redeem his earlier failure to have registered the mortgage. Whilst it is correct that the professional indemnity insurance would have covered any liability in that regard, our sense is that this practitioner takes pride in never having made a claim and sought to right the situation with the lender without recourse to insurers or other parties.

[9] In terms of mitigating features, firstly, there is the entry of a guilty plea or acknowledgement of this charge at the earliest date and his response, in our view, to the complaint does Mr Horne credit. He repaid the $50,000 to his client within a month, he has not been refunded by the client and it may be difficult for him to recover these funds in the future. He has not sought to minimise his actions or the seriousness of this error of judgement. That is how the Tribunal sees it, as a very serious error in professional judgement, but we are persuaded not one that has occurred before or is likely to occur again in Mr Horne's practice.

[10] Clearly, in mitigation also, this was a situation where a practitioner was becoming increasingly anxious about his client's transactions and attitude to this debt.

[11] In terms of personal matters, Mr Horne has an almost unblemished history of 33 years in practice, 20 years in sole practice with very minimal previous problems. He annually deals with a large number of transactions and strikes us as a diligent and conscientious practitioner who works long hours, six days per week at very reasonable charges to his clients. He struck us as a thoughtful impressive person who is aware of his misjudgement.

[12] Mr Horne has lived under the shadow of this complaint and the investigation for some 15 months, and we understand that as a consequence his health and enjoyment of life have suffered. He has provided to the Tribunal 12 glowing testimonials from people of considerable standing including two District Court Judges. His clients speak highly of him and have a very longstanding relationship with him in most cases, and that is a matter which weighs with the Tribunal strongly because we do not consider that those clients ought to be deprived of the services of this practitioner.

[13] Moving to a penalty itself, the Society, as we have indicated earlier, sought striking off. We do not consider that there is any real risk of re-offending or any requirement to protect the public in any way from Mr Horne. This has been a huge wake-up call for him and clearly a very stressful process. The primary function of the Tribunal is to consider the public interest and the protection of the public as well as the upholding of the professional reputation of the legal profession as a whole. Counsel have both cited a number of cases to us. The leading case of *Bolton v. Law Society [1994]2 All ER 486*, which eloquently refers to the need for the member of the public placing his or her affairs in the hands of lawyer and being able to trust that lawyer "to the ends of the earth" is how these proceedings must be viewed. That is, as a means of protecting that public trust and confidence, without which the profession could simply not exist and handle such serious and valuable transactions for members of the public.

[14] We consider that suspension for the same reasons is not necessary, and that the penalty ought to be one of censure and fine. Censure, which is published to the practitioner's peers, is not a hollow penalty and is not merely words, it is a means of making clear to Mr Horne that his behaviour was totally unacceptable in a professional sense and that his peers will have notice of that. In itself that, of course, has long term potentially negative effects for the practitioner and his practice.

[15] Having regard to the precedents provided by Counsel today and, in particular the decisions of *Cousins* and *Re A and B*, we consider that the penalty needs to be near the maximum, but not at the maximum in this case. Given the overall effects of this prosecution and of the censure on Mr Horne, we determine the fine to be $4,000.

[16] In terms of costs, the Law Society indicated that the costs were approximately $5,500, however there were two charges, one of which was dismissed and in fact absorbed a good deal of the time required for this hearing, and we therefore find costs in favour of the Society to be $3,000. There will also be an award of $3,000 against Mr Horne in respect of the costs of the Tribunal.

[17] Publication of Mr Horne's name is, as I understand it, accepted as being proper, in line with the current authorities.

[18] Mr Horne's name and brief details in relation to this charge are to be published in Law Talk.

Judge D F Clarkson
Chairperson