

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 2 of the New Zealand Law Society

BETWEEN

JH Hinckley
of Auckland
Applicant

AND

Ms Macduff
of Auckland
Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

[1] Mr JH Hinckley complained about the conduct of Ms Macduff in respect of work she undertook for him and his parents. I will refer to Mr JH Hinckley as JH to avoid confusion with his father whom I will refer to as Mr Hinckley. Ms Macduff had acted for him from April 2009 in respect of certain property matters relating to a family trust which had been settled by his parents and which he and his brothers were variously trustees and beneficiaries. Ms Macduff also assisted Mr Hinckley's parents in respect of their wills and matters relating to a power of attorney held by JH. JH complained about the conduct of Ms Macduff in a number of respects:

- [a] Failure to take steps to remove the caveat;
- [b] Acting for his parents when she ought not have (or alternatively, advising them to take steps which were against his interests, or disclosing matters which were confidential regarding the power of attorney to Age Concern);
- [c] Acting for (or conspiring with) his brothers against his interest;
- [d] Terminating (or claiming to terminate) the retainer inappropriately;

- [e] Costs; and
- [f] Seeking to arrange an alternative real estate agent to market the property;
- [g] Seeking to be retained to undertake conveyancing in respect of the property.

[2] The complaint was considered by the Auckland Standards Committee 2 of the New Zealand Law Society which on 9 October resolved to take no further action on the complaint. In respect of the conduct it was determined that no further action was necessary or appropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006. In respect of the complaint about costs it was noted that the bills complained about were less than \$2000 and in the absence of special reasons reg 29 of the Lawyers and Conveyancers Act (Complaints Service and Standards Committee Regulations) 2008 precluded the Committee from considering the matter. The Committee, being of the view that no special circumstances existed, declined to consider the issue of costs.

[3] JH sought a review of that decision. A review was conducted on 21 January 2010 and the parties were heard in person. Ms Macduff was heard through her counsel Mr XX.

Background

[4] Dissension had arisen between JH and his brothers in respect of the administration of a family trust. The trust had owned the family home of their parents Mr & Mrs Hinckley.

[5] Mr & Mrs Hinckley ceased occupying that home and by agreement (recorded in a deed of 29 March 2006) the home had been sold to JH with a payment to the trust which was distributed to the other brothers. A further payment of an outstanding amount was to be paid on the death of Mr & Mrs Hinckley (which was to be calculated by deducting \$200 000 from the current value of the property at the time of the death of both Mr and Mrs Hinckley). The intention of the deed was to effect a partial distribution of \$50 000 to each of the beneficiaries of the trust (the four brothers), It also enabled (by its clause 4 of the deed) JH to use the home as security against which borrowings could be made. The deed also provided that the trustees could register a caveat against the home to record their interest and that JH would execute a mortgage if required. For some years no caveat was placed on the home.

[6] JH was an attorney of his parents and largely managed their affairs including their bank accounts. There appears to have been an informal agreement that the brothers would provide funds from time to time to support Mr & Mrs Hinckley. In April 2009 it appears that disagreement arose between the brothers regarding payments that were requested by JH to be made to Mr & Mrs Hinckley. At the same time JH wished to sell the home. He stated that this was to free up funds so that they could be used to support his parents, as well as freeing up for himself his equity in the home. A

meeting of the trustees was held. JH did not attend. The trustees who did attend resolved to place a caveat on the home.

[7] JH sought Ms Macduff' assistance in effecting the sale of the home. This meant securing the removal of the caveat either by agreement of the caveators, or by filing a notice that the caveat lapse which would likely result in court proceedings if the brothers sought to sustain the caveat. JH states that he repeatedly insisted that an application to remove the caveat should be made. Ms Macduff says that while discussions of this nature did occur, she counselled against such an action and sought to obtain a removal of the caveat by agreement. Correspondence with the other trustees occurred in which settlement proposals were canvassed in late May and early June 2009. Initially there was some confusion as to the rights of the parents under the trust. Ms Macduff had assumed that they were creditors of the trust for the value of the home. However, it became clear that the value of any outstanding indebtedness to Mr & Mrs Hinckley had been gifted to the trust and they had no interest in the assets of the trust. It appears however that there was an expectation that the assets of the trust would be used to support them.

[8] In May 2009 Ms Macduff also attended on Mr & Mrs Hinckley to assist with the execution of a new will and enduring power of attorney. She did this at JH's request (although she was clearly acting for Mr & Mrs Hinckley). In an email of 4 May 2009 to Ms Macduff JH makes it clear that it is important to him that he expected Ms Macduff to refer to him as regards the contents of those documents. He said that this was because they needed to reflect his parents' wishes and he knew what those wishes were in light of the fact that he had been caring for them for many years. Ms Macduff responded by email on 5 May noting that she could not discuss the contents of the wills with JH.

[9] In early June Ms Hinckley fell ill and she died on 17 June 2009. This led to a meeting between the brothers on or about 25 June 2009 at which Ms Macduff was in attendance. The accounts of that meeting differ between Ms Macduff and JH. Ms Macduff says that an agreement was reached by which a release of the caveat would be held on a solicitor's undertaking in respect of the manner in which sale funds of the property would be applied. JH says that it was agreed that the caveat would be released immediately. I note that this view is arguably reflected in his email to Ms Macduff of 1 July (although it also notes that Ms Macduff had suggested keeping the caveat on the house until it was sold).

[10] I consider it unlikely that the other brothers who were trustees of the trust would have agreed to release the caveat without reservation and only on JH's agreement as to how the proceeds of the sale would be used. This would be very unusual and inadvisable. I note that in other correspondence between the trust to Ms Macduff the importance of sustaining the caveat was emphasised (see for

example the penultimate paragraph of the letter of 23 May 2009 and the second paragraph of the letter of 2 June 2009). I also note that Ms Macduff recorded her understanding of the meeting in her letter of 30 June 2009 (misdated the 20th).

[11] While it may be that JH took a different understanding away from the meeting of 25 June I am satisfied that the agreement reached was substantially that recorded in Ms Macduff letter of 30 June 2009.

[12] JH appears to have been frustrated at the turn of events and the fact that Ms Macduff had a different view of the agreement reached at the meeting than he had. This is reflected in his email to her of 1 July 2009 in which he instructs her to “have the caveat lifted immediately”. In that email he also stated “when the caveat is lifted in the next two days please write up your account. I will pick up the file, all copies of the wills and power of attorney”. In a further email of 2 July 2009 JH claimed that the continued existence of the caveat had resulted in lost sales, and that Ms Macduff was acting in the interests of his brothers rather than him. Ms Macduff states that at about this time JH stated that he had an agreement for the sale of the house with a big deposit and deferred settlement. The inference appears to be that he wanted to be free to negotiate such a sale without the encumbrance of the caveat.

[13] Ms Macduff wrote to JH by email of 10 July indicating that she would take the steps to file a notice triggering the lapsing of the caveat, but reiterated her advice that in her view this was unwise. However shortly after that email was sent Ms Macduff says that JH stated that if the trustees did not allow the caveat to lapse then he would remove them as trustees using his power of attorney over his father's affairs, effectively putting him in control of the trust.

[14] Ms Macduff says that at this time her concerns about the conduct of JH reached a level where she considered that she could act in the matter no further. On 13 July she wrote to JH stating that she did not consider that she could any longer act for him. It is not clear when Ms Macduff ceased acting for Mr Hinckley. It appears that around 13 July Ms Macduff attended on Mr Hinckley and told him that she could act no further. At that meeting she enquired whether he wished her to arrange for a person from Age Concern to visit him and he agreed.

[15] A person from Age Concern visited Mr Hinckley at some later date. It appears that their further assistance was not required. There is an email exchange between JH and a member of Age Concern of 17/18 August 2009. That exchange confirms that a visit occurred. One email of 18 August 2009 from the member of Age Concern to what appears to be her supervisor records [Ms Macduff] contacted me concerned that he was “abusing his enduring power of attorney in respect of his father”. It appears that this email was erroneously disclosed to JH who responded by alleging that Ms Macduff

conspired with JH's brothers to revoke the power of attorney and that Ms Macduff was acting for the brothers all along.

[16] For clarity I record that I find that Ms Macduff when arranging for a person from Age Concern to attend on Mr Hinckley disclosed her concern that JH was abusing his position as the holder of an enduring power of attorney in respect of his father. In making that finding I place considerable weight on the email of YY of Age Concern to her supervisor of 18 August 2009. In responding to the Law Society in respect of that email Ms Macduff noted "I had nothing to do with Mr Hinckley Senior's decision to revoke the Attorney. Rather I referred that issue to Age Concern with his prior consent". This is consistent with my finding.

Expert opinion

[17] An opinion of Mr ZZ was provided to me on behalf of Ms Macduff. I was invited to place considerable weight on his view that the Standards Committee had reached the proper decision in this matter. Mr ZZ is well known as a former president of the New Zealand Law Society and prominent Auckland lawyer.

[18] I decline to place weight on that opinion. I do not consider it appropriate in proceedings of this nature to take into account expert evidence of the nature tendered. The views of the Standards Committee as an expert professional panel are of considerably more significance than that of a relatively brief letter from a single professional expert who has (I understand) been paid to provide a view on the matter and is not available to further explain his views. I also observe that it is not realistic to expect a lay complainant to provide (or respond to) expert evidence of this kind. The conduct of reviews of this nature is required to be undertaken with as little formality as possible. The introduction of expert's reports cuts across that objective.

[19] I have a discretion under s 207 of the Lawyers and Conveyancers Act 2006 whether or not to take into account evidence. In this case I exercise that discretion against taking into account the letter of Mr ZZ of 4 December 2009 for the reasons given.

Consideration

[20] Some of the allegations made by JH are not supported by evidence. In particular there is no evidence that Ms Macduff acted for or conspired with JH's brothers in any way. JH has also made some intemperate statements about the alleged conduct of Ms Macduff suggesting that she has "carried out a plane of revenge and retaliation" and that her conduct "indicates sociopathic tendencies" (in the letter of JH to the Law Society of 17 September 2009). There is no evidence of any such behaviour by Ms Macduff. I now turn to consider the specific grounds of complaint.

Costs

[21] Mr Hinckley complained about the bills of costs rendered in this matter. The Standards Committee declined to review the bills on the basis that they fell below the \$2000 threshold for consideration imposed by reg 29 of the Lawyers and Conveyancers Act (Complaints Service and Standards Committee Regulations) 2008. The Committee considered that there were no special circumstances which displaced that presumption. That conclusion was a reasonable one to reach. It can also be noted that in all of the circumstances the fees appears to be reasonable in light of the amount of work undertaken by Ms Macduff in these matters. I uphold this aspect of the Standard Committee's decision.

Failure to take steps to remove the caveat

[22] JH states that he repeatedly gave Ms Macduff instructions to initiate the removal of the caveat by filing the requisite notice in the Land Transfer Office. It is certainly the case that on a number of occasions JH emphasised his desire to have the caveat removed by whatever means was necessary. Ms Macduff acknowledged that JH made clear to her on a number of occasions that he wanted her to commence the necessary procedure to have the caveat removed.

[23] From my reading of the material and from hearing the parties in this matter it is clear that JH's view was that the caveat should be removed. He was also of the view that this could be done easily and cheaply. While it may be easy and cheap to trigger the caveat removal procedure by the filing of notices in the Land Transfer office it is common that proceedings to sustain the caveat are brought in the High Court (as it is understood occurred here). This is not a simple or cheap procedure. In so far as JH was of the view that the caveat could simply be removed by the lodging of a notice to that effect he was in error.

[24] There was some discussion at the hearing as to whether the caveat had in fact been lifted. Mr Hinckley provided information to me in this regard after the hearing. I note that I do not consider that it is necessary to determine what happened in respect of the caveat after the termination of Ms Macduff's retainer. Accordingly I need not take into account the further information relating to the caveat which was provided. I note for completeness that that further information reiterated other points that JH had made at the hearing. I do not consider that any new matters were raised which required any response from Ms Macduff.

[25] It is clear that Ms Macduff took a different view of the best approach to the issue of the caveat. She took the view that it would be better to first seek a consensual removal of the caveat on the understanding that the interests and objectives of JH as indicated to her could be satisfied by that

course of action. Accordingly she counselled JH against triggering the formal removal procedure and sought to negotiate with the other brothers to secure an agreement to remove the caveat to facilitate the sale of the house. I have found that an agreement to this effect was reached at the meeting of 25 June 2009.

[26] It is unclear why the agreement reached on 25 June 2009 was not acceptable to JH. If all he wanted was to facilitate the sale of the house then it seemed a sensible resolution of differences. There has been a suggestion that JH was not frank with Ms Macduff and that in fact he intended to deal in the property in a way which was inconsistent with the rights of his brothers under the trust and the deed of 29 March 2006. This would be impossible under the agreement of 25 June 2009 which protected the trust funds by requiring them to be placed in a joint trust bank account requiring the signature of all three brothers as trustees.

[27] I have reviewed the correspondence in the matter and heard from both parties. I consider that Ms Macduff acted appropriately in relation to the removal of the caveat. It is not unusual for there to be a period within which a lawyer will counsel a client on a particular course of action which may not be the same as that initially demanded by the client. If a client gives an unequivocal instruction in light of that advice then the lawyer may be required to follow it. While JH made clear his objectives, I do not consider that he gave an unequivocal instruction to file the notice to remove the caveat until July 2009. There was no unacceptable delay in this regard by Ms Macduff.

Acting for Mr & Mrs Hinckley

[28] There are a number of strands to the complaint in relation to Ms Macduff acting for Mr & Mrs Hinckley. JH had requested Ms Macduff to attend on his parents to complete wills and an enduring power of attorney. The correspondence in respect of this complaint indicates that JH was of the view that in undertaking this work Ms Macduff was acting on his instructions rather than those of his parents. This is inaccurate. While it was entirely appropriate for JH to request that Ms Macduff attend on his parents to undertake the work, once she did so they became her clients in this regard. Ms Macduff did not owe JH any particular professional duties in respect of the completion of the wills and the power of attorney. Those duties were owed to his parents. Ms Macduff was correct to refuse JH's request for information as regards the content of the wills. Obviously in light of the fact that JH was to be the attorney, his involvement in that aspect of the work was appropriate.

[29] The first allegation was that Ms Macduff ought not have acted for Mr & Mrs Hinckley. I do not consider this to be the case. The work, at least at the outset, appeared to be of a kind that is not uncommon where there are aged parents. In such cases it is usual for a lawyer to act for more than one member of the family. In doing so Ms Macduff was obliged to ensure that she could discharge her

duties owed to all clients properly (pursuant to r 6.1 of the Rules of Conduct and Client Care for Lawyers (ROCC)). On an examination of the material provided to me and on hearing the parties I am satisfied that it was appropriate for Ms Macduff to take the instructions of Mr & Mrs Hinckley.

[30] Ms Macduff terminated the retainer with Mr Hinckley (Mrs Hinckley having died) around 13 July 2009. She says she did this because she was concerned that JH was intending to misuse his power of attorney. In this regard she had concluded that she could no longer discharge the duties owed to both JH and Mr Hinckley as respective clients. In light of this she was obliged to terminate the retainer in accordance with r 6.1.2 of the ROCCC.

[31] JH says that Ms Macduff advised Mr Hinckley to revoke the power of attorney that JH held. I was invited to make this inference on the basis that the power of attorney was in fact revoked, and that Ms Macduff admits to being of the view that it was JH's intention to misuse the power. Ms Macduff denies this saying that she simply explained that she could not act further in light of the escalating family conflict. There is insufficient evidence to conclude that Ms Macduff disclosed to Mr Hinckley her suspicions, or that she advised any particular course of action in respect of the power of attorney. I conclude that Ms Macduff acted appropriately in terminating the retainer with Mr Hinckley.

[32] It is also alleged that Ms Macduff made inappropriate disclosures to Aged Concern regarding her suspicions about JH's behaviour. I have found earlier that Ms Macduff indicated to Aged Concern that she was concerned that JH was abusing his power of attorney, or intended to do so. The question therefore is whether that disclosure was in breach of Ms Macduff's professional obligations.

[33] It is important that I make clear that I am making no finding about whether or not JH engaged in any wrongdoing as regards his parents and/or brothers. However, Ms Macduff had suspicions that this was the case. Those suspicions were based on statements of JH, as well as his behaviour throughout the period of the retainer. JH dismissed some of his statements as said frivolously and not seriously intended (such as his intention to use the power of attorney to remove his brothers as trustees). This is doubtful in light of the fact that it appears he sought a second opinion as to whether he could have used the power to remove his brothers from the firm of AA and Associates. JH argued that the fact that he obtained that second opinion indicates that he did not intend to breach his legal obligations. While that may be so, Ms Macduff was not aware at the time that he had obtained that further opinion and could not take that into account when she formed her view that he may have been intending to act inappropriately. I conclude that the view of Ms Macduff that JH may have been acting in a way which was inappropriate as regards (in particular) his father was tenable and not unreasonable.

[34] Ms Macduff was subject to the duty of confidentiality pursuant to r 8 of the ROCCC:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship

[35] Prima facie that duty required Ms Macduff to keep in strict confidence any information concerning JH obtained in the course of the relationship. Conversely she had a corresponding duty to disclose to Mr Hinckley any relevant information she acquired pursuant to r 7 of the ROCCC. It was this conflict which led her to terminate the retainers with JH and Mr Hinckley respectively.

[36] There are limited exceptions to the duty of confidence found in rr 8.2 and 8.4. In particular r 8.4(d) provides that a lawyer may disclose confidential information where

the lawyer reasonably believes that the lawyer's services have been used by the client to perpetrate or conceal a crime or fraud and disclosure is required to prevent, mitigate, or rectify substantial injury to the interests, property, or reputation of another person that is reasonably likely to result or has resulted from the client's commission of the crime or fraud;

[37] In so far as Ms Macduff believed that JH was intending to use the power of attorney to thwart his father's intentions and to prefer himself over the interests of his brothers and trust this amounted to a civil law fraud. In fact it is a classic fraud on a power. There is no requirement that the fraud be criminal (indeed criminal conduct is a separate basis for disclosure). Ms Macduff was of the view that JH was intending to use the power of attorney fraudulently to harm the interests of his father and brothers. In light of this r 8.4(d) permitted her to disclose the facts necessary to prevent that harm.

[38] When a lawyer discloses confidential information under one of the exceptions found in the rules he or she must do so "only to the appropriate person and only to the extent reasonably necessary for the permitted purpose" (r 8.5 ROCCC). The issue therefore is whether the disclosure in this case was to the appropriate purpose and to an appropriately limited extent.

[39] In the circumstances disclosure to a recognised advocacy group for the aged was appropriate. It is also clear that Ms Macduff did not disclose any significant detail about the affairs of JH, Mr Hinckley and the wider family. She disclosed only that she had concerns regarding the use of the power of attorney. I consider that this disclosure was appropriately limited. I also take into account the compelling public policy factor that lawyers who have concerns about abuse of the elderly by their clients should be able to take steps to ensure that such abuse does not occur.

[40] I conclude that Ms Macduff did not breach her professional obligations in disclosing her concerns regarding JH's proposed use of the power of attorney to Aged Concern.

Terminating the retainer

[41] JH complained about the way in which the retainer was terminated. In particular he considered that he had terminated the retainer with Ms Macduff by an email to her dated 1 July 2009. In that email he expressed frustration that the caveat had not been lifted. The email concluded by stating “when the caveat is lifted in 2 days please write up your account. I will pick up the file, all copies of the wills and power of attorney”. JH states that this is an unequivocal termination. He states that the reference to the caveat was ironic.

[42] The email is, however, equivocal. Earlier in the email he had also stated “I am giving you an instruction to have the caveat lifted immediately as agreed to by my brothers at the meeting last Thursday”. The need for the immediate lifting of the caveat was repeated in an email from JH to Ms Macduff the next day (in response to a letter being sent by Ms Macduff to JH and his brothers about the settlement agreement). That email did not suggest that Ms Macduff’s retainer had been terminated and she should not be corresponding with JH's brothers in this matter.

[43] It appears that a telephone call must have occurred around 10 July 2009 in which JH reiterated his view that a notice triggering the lapsing of the caveat should be lodged. On the 10 of July Ms Macduff wrote a long email to JH indicating that she thought the course of action unwise but indicating that if he insisted he would need to attend Ms Macduff’s office to arrange matters. It appears that the same day Ms Macduff drafted the required notice.

[44] A further telephone conversation ensued. It was at this point that Ms Macduff concluded that she ought act no further and on 13 July she wrote to JH terminating the retainer. JH objects strongly to this letter and states that it is unprofessional of Ms Macduff to claim to be terminating a retainer which he had already terminated. The view that the retainer was still extant is certainly plausible. JH was continuing to give instructions, and not objecting to Ms Macduff taking steps on his behalf. It also appears that about this time JH provided a cheque to cover the costs of registering the notice that the caveat lapse.

[45] I do not consider it necessary to determine when the retainer between Ms Macduff and JH was terminated or by whom. There is obvious wisdom in a lawyer setting out the fact that a retainer has come to an end. While JH may have a particular view about when the retainer came to an end I can see nothing unprofessional in the behaviour of Ms Macduff in this regard.

Wider matters

[46] There were a number of other complaints relating to various matters. One such complaint was that Ms Macduff inappropriately tried to have a real estate agent that she knew appointed as the listing

agent of the property. Another was that she sought to have herself appointed to undertake the conveyancing of the property when it was sold. I have considered these complaints. They are secondary to the matters dealt with above and do not propose to set out in detail my deliberation. However, I do not consider that there is any foundation to them. It is not unusual for a lawyer to recommend a real estate agent. In this case Ms Macduff had concerns that the agent who was selling the house did not understand the procedure for the removal of a caveat. There does not appear to be any particular relationship between Ms Macduff and the recommended agent. In any event in this case JH did not retain the recommended agent but chose to stay with the agent he had originally selected.

[47] In respect of Ms Macduff undertaking the conveyancing of the property I could find no evidence other than the bare assertion of JH that Ms Macduff sought to undertake that work. If anything the documents suggest that it was contemplated that a separate firm would be instructed. In any event, given that Ms Macduff was acting for JH it would not have been inappropriate for her (or her firm) to offer to undertake the conveyancing on his behalf.

Decision

[48] The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 2 is confirmed.

DATED this 28th day of January 2010

Duncan Webb

Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

JH Hinckley as Applicant

Ms Macduff as Respondent

The Auckland Standards Committee 2

B and B Solicitors as a related party

The New Zealand Law Society