NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 24
LCDT 007/16

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE No. 2** Applicant
AND	**MR M** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms J Gray
Mr C Lucas
Ms C Rowe
Mr W Smith

DATE OF HEARING 25 August 2016

HELD AT Auckland District Court

DATE OF DECISION 6 September 2016

COUNSEL
Mr P Davey for the Standards Committee
Practitioner In Person

DECISION OF TRIBUNAL ON LIABILITY FOR CHARGE

Introduction

[1] The practitioner, Mr M, had been friends with the complainant, Ms G, for over 40 years. In 2012 she appointed him as her attorney under an Enduring Power of Attorney ("EPA"), having consulted with her own lawyer, Mr G.

[2] When, following hospitalisation in early 2014, a doctor certified in May 2014, that Ms G was no longer competent to manage her own affairs, the EPA "crystallised" and Mr M stepped up to help out his old friend.

[3] Sadly, Mr M was not attuned to the different (and, as we have found, conflicting) roles imposed on him. He did not understand that in acting as Attorney, as well as being Chairman of the local branch of a charity, to which Ms G would make donations, he was placing himself into a position of divided loyalties.

[4] When shortly after, he resumed practice as a barrister, and charged fees for his attendances to Ms G, he had become even more muddled and unaware of the ethical obligations to which he needed to pay attention.

Issues

[5] The issues which emerged as requiring determination are:

1. Do the supervisory provisions of the PPPR Act[1] deprive this Tribunal of jurisdiction?

2. Was the conduct of the practitioner of a professional or personal nature? (s 7(a) or (b)).[2]

[1] Protection of Personal and Property Rights Act.
[2] Lawyers and Conveyancers Act 2006 ("LCA").

3. Were the breaches of the Rules by Mr M, such as to be characterised as wilful or reckless, so as to constitute "misconduct"?

4. Alternatively, was Mr M's conduct disgraceful or dishonourable, so as to constitute misconduct?

5. If not, did the evidence establish negligence or incompetence to the extent set out in s 241(c)?

6. If not, was Mr M's conduct such as to be categorised as "unsatisfactory" pursuant to s 12 of the LCA?

Background

[6] We wish to note that the charge brought relates to conduct after a practising certificate was granted to Mr M on 15 July 2014. The events prior to that date are recorded simply to contextualise the conduct under consideration after 15 July, for example, to provide information about how he came to be in possession of certain funds of the complainant.

[7] Mr M had practised as a barrister sole for a number of years until 30 June 2013, took a break for approximately 11 to 12 months and sought a further practising certificate, which was issued on 15 July 2014. He retired from practice at the end of January 2015. Mr M is in his early 70s.

[8] He had been friends with the complainant Ms G for well over 40 years and they both shared an interest in a particular area of charitable work. Ms G had been supportive of various charities aligned with this area for her entire working life, as reported by Mr M.

[9] As stated in the introduction Ms G executed an EPA on 25 May 2012 appointing Mr M as her Attorney. The terms of the EPA were standard. The particular clauses which have been under scrutiny are Clauses 6 and 7 which read:

Attorney's power to benefit self and others

6. I authorise my attorney to do the following when acting on my behalf when I am mentally incapable:

- make payments in respect of out-of-pocket expenses incurred by my attorney:

- make payments in respect of professional fees incurred by my attorney in any professional capacity:

Attorney to provide information on exercise of powers

7. My attorney must provide the following persons with the specified kinds of information relating to the exercise of the attorney's powers under the enduring power of attorney if those persons should request it:

RDG of Auckland, New Zealand, Solicitor and JAB of Auckland, Retired as to significant expenditure over $5,000 and provide copies of financial statements.

[10] On 5 May 2014 Dr S certified that Ms G was mentally incapable of handling her own affairs.

[11] Following this Mr M visited Ms G and discussed with her the management of her affairs. He gathered up a number of papers that he found at the rest home where she lived and carried out due diligence in relation to her financial affairs.

[12] In the course of doing so Mr M uncovered a Westpac account about which Ms G had been unaware and which had simply continued as a term deposit for some 25 years. Ultimately the discovery of this account provided over $39,000 to Ms G's assets of which she had previously been unaware.

[13] Ms G was also the beneficiary in an estate in the United Kingdom which required some input from Mr M in terms of assisting her to make her claim on the estate. The difficulties arose in this, and indeed in some of the banking transactions because Ms G no longer had any form of verifiable identification, having destroyed her driver's licence and having no current passport. The interest in the estate was a significant one and was expected to yield Ms G some $500,000 to $600,000.

[14] Prior to the EPA becoming operative, Mr M's evidence is that he and Ms G had had conversations concerning the use of her expected inheritance. While Ms G had a will, she had no children or close relatives in New Zealand and had intended to make some charitable bequests. Mr M made the suggestion that she might derive more enjoyment from seeing the money utilised during her lifetime, by means of a gift to charity, and she was said to have agreed wholeheartedly with this notion. Mr M then

discussed with Ms G certain projects within his own charity – one whereby wages were required for a certain staff member in the charity and another which involved the purchasing of land and building from which the charity's operations could be conducted. In relation to the first project Mr M said that Ms G agreed to contribute $20,000 which was the annual salary of the staff member (although ultimately this was not required for that purpose and the funds were applied to the building project as far as we are able to ascertain). This donation was to come from the maturing of another term deposit held by Ms G.

[15] Further, however, Mr M says Ms G agreed to the suggestion that she pledge $80,000 of her expected inheritance towards the building project. Mr M is clear, and there is no reliable evidence to the contrary (Ms G now suffering from dementia to the extent that her evidence was not available and would not, in any event, be reliable) that Ms G made this pledge verbally at a time when she was still competent.

[16] However the two $10,000 payments which comprised the $20,000 donation were not paid until 11 June 2014 and were effected by Mr M in his role as Attorney by transferring from Ms G's bank account, following the maturing of a deposit. Secondly, the pledge for $80,000 was signed on 16 June 2014. This pledge was one written by Mr M and signed by Ms G despite Mr M's knowledge that she was no longer competent. His explanation for this was he regarded it simply as a minute or documentary record of her earlier expressed intent (while still competent).

[17] His evidence was clear that when Ms G later disclaimed the wish to make this larger donation, that it was taken no further.

[18] The one further area of concern raised by the Standards Committee is that Mr M withdrew $1,000 from Ms G's funds to hold in cash for her benefit for any incidental purchases she required at the rest home. He said this was done at the rest home's request and the funds were held in his safe and indeed never utilised. They were subsequently returned by him following the intervention of another lawyer on Ms G's behalf.

[19] On 30 May 2014 he issued invoices totalling approximately $5,700 in respect of his attendances under the EPA and made payment from Ms G's bank account for these invoices. Further invoices of 30 June 2014 for $3,885.97 were presented and

paid for attendances during June. These included obtaining statutory declarations as to Ms G's identity and having these notarised for the purposes of the realisation of the estate bequest in England.

[20] In mid-July, around the same time as Mr M received his practising certificate, Ms G was seen by a geriatrician, Dr Sh, who diagnosed her as having moderate dementia and referred to an Addenbrooke's assessment of 66/100.

[21] This assessment was forwarded to the other doctor, Dr S. In the meantime a further doctor, Dr HL, a general practitioner, had examined Ms G on 10 June and declared her to be "mentally competent to manage his/her (sic) own affairs in relation to his/hers (sic) property or welfare". It is not clear when Mr M became aware of Dr HL's certificate but we understand it was not until the EPA was challenged in late August.

[22] In mid-late July Ms G was taken to see another lawyer, Mr E, because she had expressed concern about the withdrawal of the $20,000 from her account. Mr E wrote to Mr M (via Mr G) asking him to explain this transaction. Although it was a relatively straightforward matter for Mr M to explain the donation, and related movement of funds, he recorded (and subsequently charged Ms G) seven hours to research the transactions and reply to Mr E.

[23] The next significant event was that Mr M received the letter of 28 August 2014 from yet another lawyer, Ms P, purporting to revoke the EPA. Mr M did not accept the revocation, since it was based on the very brief certificate of Dr HL, which described no formal testing of Ms G. He considered that the EPA could only be revoked if the Family Court directed that, or Ms G was established to be "wholly competent ".

[24] Ms G indicated through her lawyer that she had not authorised the $20,000 donation. This is completely at odds with the evidence of Mr M. We note that it seems common ground that Ms G's memory is seriously impaired. That being the case and there being no further evidence on the point, we do not consider the Standards Committee has established that fact to the level of proof required.

[25] While Mr M did draft an application to the Family Court, unfortunately he did not pursue this course. Mr M points to the confusing picture of Ms G's competence,

whereby Dr Sh reversed his earlier view, and then later Dr I found her to be partially competent but in need of assistance and support in understanding the nature and consequences of more complex financial decisions.

Issue 1

[26] We do not consider the existence of supervisory powers under another piece of legislation, in this case the PPPR Act, removes the disciplinary jurisdiction of this Tribunal. Certainly the examination of conduct in the criminal justice setting in no way removes our jurisdiction, in fact at times forms the platform for it. The answer to this issue is "No".

Issue 2

[27] Mr M argued that his conduct was not connected with the provision of regulated services. Essentially, he argued that Ms G could not be a "client" because she lacked capacity, and if there was no client, then there could be no provision of regulated services. He submitted that acting as an attorney under an EPA, placed him in the shoes of the subject of the EPA to the extent that there was no client. He conceded that this area was confusing and thus submitted that Lawyer's should not be punished if they get it wrong.

[28] Mr Davey referred the Tribunal to the decision of the High Court in *Orlov,* which confirmed the earlier view of the Tribunal that there is no gap between personal and professional conduct, considered in ss 7(1)(a) and 7(1)(b)(ii). It was made clear that personal misconduct, with its higher threshold, was limited to situations clearly unconnected with the work environment.

[29] In assessing Mr M's role, we note the following factors:

- He stated on a number of occasions in the correspondence that he was justified in charging fees when acting in his professional capacity;

- He issued invoices referring to professional attendances such as drafting and having declarations sworn for the estate claim;

- He had Ms G sign an acknowledgement that he was entitled to charge and take payments as her attorney when acting “in any professional capacity”.

[30] Thus we find that the correct section under which the conduct is to be considered is s 7(1)(a).

[31] We firmly reject the notion that Ms G was not a client because she lacked capacity to give instructions. Such a reading of the Act would totally undermine the protective purposes contained in s 3.

Issue 3

[32] There are a number of Rules alleged to have been breached by Mr M. The most serious is Rule 5, which concerns acting when a conflict of interest exists.

Towards the end of the hearing we put to Mr M the following examples of conduct which was of concern, because of rule infringements:

- He was not alert to the conflict of interest which existed between his role as Chairperson of the charity which received a donation from Ms G’s funds, and his role as her attorney (Rule 5);

- He was a barrister acting as an Attorney under an EPA (Rule 14.2(c));

- He was a barrister without an instructing solicitor (Rule 14.4), and in addition charged fees directly;

- He held cash funds for a client (Rule 14.2(e));

- He did not provide his client with the statutory information required (Rule 3.4, which applied to barristers at that time);

- He billed seven hours for a simple query about his conduct, when no charge ought to have been made;

- He did not provide fulsome details about the $20,000 payment, when asked to explain it;

- In allowing the building purchase (by ‘his’ charity) to proceed after the $20,000 payment had been questioned he again acted in conflict of interest;

- He appeared to consider his subsequent resignation from the charity position resolved any conflict;

- He failed to seek guidance from the court on his role, although it is accepted he did seek advice.

[33] Having heard from Mr M directly, we formed the view that the breaches of these Rules were not wilful or reckless. We consider the lawyer to have been inexperienced and misguided in his actions. This was the first time he had acted as an attorney under an EPA. He did seek advice, but unfortunately did not follow through on the application to the Family Court to clarify his position. We do not consider his conduct, although serious and muddled, was intended to do anything other than enact the wishes of Ms G while competent. The answer to the question posed by this issue is “No”.

Issue 4

[34] Nor do we consider that Mr M’s behaviour was disgraceful or dishonourable. We consider that he was well-motivated to assist a person who had been a longtime friend and who shared the same concerns as him, as reflected in their charitable work. Again, we find this falls short of misconduct.

Issue 5

[35] Viewing the listed conduct above overall, we do consider that Mr M has been guilty of negligence or incompetence, to the degree specified by s 241(c), namely of such a degree as to reflect on his fitness to practice, or as to bring the profession into disrepute. We consider the failure to be attuned to a possible or actual conflict of interest is a very serious one. If lawyers are not so attuned, there is a significant

potential for damage to the lay person. Clarity of role is essential in a lawyer, and Mr M failed to maintain that clarity.

Issue 6

[36] Having found the charge proved at the standard of negligence, we do not address the lesser charge of unsatisfactory conduct.

Directions

[37] Counsel for the Standards Committee is to file submissions as to penalty within 21 days of the delivery of this decision.

[38] Mr M may file reply submissions on penalty within a further 21 days.

DATED at AUCKLAND this 6th day of September 2016

Judge D F Clarkson
Chair