NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 17

LCDT 028/16

BETWEEN **AUCKLAND STANDARDS COMMITTEE 2**

Applicant

ELIZABETH ANN GARDNER

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms F Freeman

Mr G McKenzie

Ms C Rowe

Mr I Williams

HEARING at the District Court, Auckland

DATE 6 and 7 July 2017

DATE OF DECISION 14 July 2017

COUNSEL

Mr M Hodge for the Applicant

Mr K Muir and Ms B Webster for the Respondent

RESERVED DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGE

[1] The respondent practitioner is charged with misconduct under s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (the Act). There are two alternative charges being serious negligence in terms of s 241(c) of the Act and unsatisfactory conduct within the meaning of s 12(b) or (c) of the Act.

[2] The respondent pleaded not guilty to those charges. A hearing took place in Auckland on 6 and 7 July 2017 at the conclusion of which the Tribunal reserved its decision.

[3] The charges arise out of a complaint made by J in March 2016 relating to work undertaken by the respondent for J and her late husband B in March 2012.

[4] J alleged that the respondent was instructed to prepare wills for herself and her husband but that the respondent took it upon herself to:

(a) Create a trust which was called the M Trust (the Trust).

(b) Transfer to the Trust the main asset owned by J and B which was their home at M Avenue.

(c) Prepare enduring powers of attorney as to property and welfare appointing C, the daughter of B, as attorney.

[5] The allegation is that these steps were taken in order to benefit C to the exclusion of B and J for the reason that, as the likely sole surviving trustee, she could as such elect to receive the entire property to the exclusion of other named beneficiaries.

Background

[6] The Background facts to this matter are simple. At the time of the events in 2012, B and J were both in their 80's and each had 2 surviving children by previous relationships. They had been married for 30 years. A third child of B had died in 2011. They had decided to make new wills. Their will instructions to the respondent were that on the death of the survivor of them the whole of the estate of the survivor was to be divided between the 4 children as to 75% equally between the daughter of J and the daughter of B. The remaining 25% was to be divided equally between each of the sons of J and of B.

[7] J's complaints about the documents referred to in para [4] above are:

(a) Neither she nor her late husband gave the respondent instructions to create any of the documents other than the wills.

(b) The respondent did not discuss or explain the prepared documents with her and her late husband.

(c) That the documents set up C to eventually take control of the assets for her sole benefit.

[8] The respondent's response to these allegations is that:

(a) B and J wanted to make sure that the family assets were to be divided between the children of each of them in shares that they had discussed and agreed on.

(b) They also wanted to make sure that there was no possibility that there would be a change to their wishes after the death of one of them.

(c) That she discussed the approach with B and J, took them through a draft deed, and then received instructions accordingly.

[9] There is much dispute between J and the respondent about factual matters. J was strident in her view that the respondent was and is a liar and that what she said about her instructions and actions simply did not happen. For her part, the respondent said that she drafted the documents in accordance with instructions and with appropriate advice and explanation to B and J.

[10] C is the daughter of B. She had sworn an affidavit dated 8 May 2017 in which she described the background circumstances leading to the creation of the wills, trust deed and powers of attorney by the respondent. The M Avenue property was on a steep section such that it was difficult for B to get in and out of the house. J wanted to sell the property and purchase a smaller home on a flat and manageable section.

[11] C and her husband came to New Zealand in late February 2012. They both sat down with B and J and talked through a number of options including the sale of their home, the purchase of a smaller home or moving to a retirement village. Their discussion resulted in J and her husband deciding that they definitely wanted to move. This was at a time when B and J declared that they had absolute trust and confidence in C. C then pre-arranged mortgage finance with her bank because she understood from the information available to her that there would not be enough money left from the sale of B and J's home for her father and J to themselves purchase a replacement home.

[12] A home at A Drive was found which suited B and J. It was purchased by C. It was C's belief that the price difference between what the existing home would sell for and the price of the A Drive home was not affordable for her father and J. She said that it was agreed that she would buy A Drive and that the existing home property would be retained and rented out to meet the mortgage repayments on A Drive.

[13] C, who resides in U, gave evidence before the Tribunal by audio visual link. She was cross-examined by counsel for the applicant.

[14] C said that she, her father and J met with the respondent where what they hoped to achieve was discussed. At a subsequent meeting on 29 March 2012 the

respondent had prepared wills, a trust deed and powers of attorney. She deposed that the respondent took her father and J through the documents and explained the documents to them. The documents were then signed.

[15] C said that the idea of the trust was hers and that she had previously discussed that with her lawyer.[1] She said that she and her husband had discussed with her father and J the notion of a trust, remaking of wills and powers of attorney before making an appointment with the respondent. C did say that her own lawyer was not experienced in trust matters and recommended they engage someone who was.

[16] C further said that because of the whole discussion that had occurred previously, she J and B then went to the respondent to put the arrangements in place. At that meeting she said that she would probably have told the respondent that "we've discussed it and this is what we wanted".[2] This would have been in answer to the respondent's questions to her father and J about what was to be achieved by the documents.

[17] C said that she did not remember much around the signing of the documents but that J picked up wrong spelling. C was unequivocal and clear in her evidence that the formation of a trust had been discussed between her J and B at their home, where she was staying before the first meeting with the respondent. After the signing of the documents, her father and J moved into A Drive and lived there rent free. C applied the rents from B and J's house towards meeting the mortgage payments in respect of A Drive. Although the accounting treatment of income and expenses for the respective properties was not as would normally be expected, there is no doubt that J as survivor has benefited financially from living rent free in the A Drive home which is owned by C. The mortgage costs in respect of A Drive exceeded the income from the now trust property which was offset against the operating costs of both properties. C made up the difference from her own funds.

[1] Transcript at p 107, line 10.
[2] Transcript at p 105, line 10.

[18] B died in 2015. C said that in September 2015 J stopped communicating. That came as a surprise and from there matters got worse. Her understanding for the deterioration was that J, having received a tax bill from accountants was surprised to discover that there was a trust in place. J claimed that she had no knowledge before then of the existence of a trust. J also expressed the belief that she, C, was going to move her brother D into either A Drive or the trust property after J's death and that she had deceived her and her husband. As recorded in para [19], we have accepted the evidence of C in matters of disputed fact. We find that the Trust had been discussed before the first meeting with the respondent and that there could be no misunderstanding about it. The Tribunal also concluded that J was not privy to the conversation regarding D and that either it was misdescribed to her or she misunderstood what she had been told. The conclusion is that there is no sound basis for J to come to these views. Since then lawyers have been involved on behalf of J and C leading to a Deed of Consent and Release whereby C resigns as a trustee leaving J as the sole remaining trustee.

[19] Having seen and heard from C, the Tribunal reached the conclusion that she is an honest witness who has been seriously saddened by the actions of J arising from her mistaken beliefs and refusal to see reason, and that in matters of conflict C's evidence must be preferred. C's recollections were clear and rational. When she did not have an accurate recollection she said so.

[20] At the conclusion of the evidence, counsel for the applicant recognised as much by seeking leave to withdraw the charge of misconduct. He noted the evidence of the family discussion in advance of seeing the respondent and the respondent's evidence that she considered that the family had come along with a joint position. Leave to withdraw the charge was granted.

The remaining charges of Negligence and Unsatisfactory Conduct

[21] Counsel for the applicant submitted that the work carried out by the respondent was serious negligence of the kind engaged by s 241(c) of the Act.

[22] He submitted that there are two fundamental defects with the arrangements that were put in place being:

(a) That B and J's property was alienated away from them without the retention of a life interest; and

(b) That C is given the power of appointment of a trustee who could be favourable to her wishes and of an additional discretionary beneficiary who could be herself, following the death of B and J, such that she would have effective control of the trust and ownership of the property.

[23] It was not suggested that C had in fact taken any such advantage. The Scheme whereby B and J, and then J solely, lived in A Drive was only achieved by C subsidising the mortgage repayments on A Drive because the rent from the trust property was insufficient to meet the outgoings on A Drive.

[24] Counsel submitted that there are two parts to the question of alienation. The first part is that B and J were not beneficiaries of the trust and lost any interest in the property transferred to the trust. The second part is that B's assets which could be left under his will were limited to personal property thus effectively disinheriting J.

[25] Counsel questioned the appropriateness of the arrangements put in place to secure the primary intention of B and J to secure their house property for the benefit of the children. He argued that there were other options available to achieve what B and J wanted. Those options were:

(a) Mutual Wills which can be made on an irrevocable basis pursuant to s 30 of the Wills Act 2007.

(b) Life Interest Wills by which B and J would leave their respective interests in the property as tenants in common on trust. In the case of B his interest would be on trust for his two children subject to a life interest for his surviving spouse. The will of J would be in identical terms for her two children.

(c) Fixed Trust which prevented the trustees from departing from the intended distribution and which would also have conferred a life interest on B and J.

[26] Counsel submitted that any one of these options was preferable to what has occurred and that either a Life Interest Will or a Fixed Trust was consistent with the instructions of B and J. Either was not overly complex or difficult. He was critical of the respondent for not having explored or discussed those options with her clients.

[27] At this point it is relevant to find that the respondent did not discuss these options. Having listened to her evidence we find that she lacked precision about what occurred at the meetings with her clients and as to what was discussed or what advice and explanations she gave other than to state what she would generally do in the circumstances. The impression was that the respondent did not recollect what was said and her ability to give evidence was prejudiced by her lack of record keeping. That impression did not lead us to the point that the respondent was acting outside the scope of her instructions. We consider that the respondent proceeded to act on what she considered were the clear instructions given to her about wills, a trust deed and powers of attorney. That conclusion is supported by the evidence of C.

[28] Counsel for the applicant has accepted that there is nothing inherently wrong with the trust model but argued that the trust wasn't drafted correctly. First it did not achieve the aim of the instructions in that it was not fixed. Secondly, there ought to have been a record put in place to protect B and J such as a life interest and as well their being nominated as discretionary beneficiaries. He submitted the drafting errors were serious because it alienated the property away from B and J. Such a serious drafting error therefore meets the threshold of serious negligence. (s 241)(c).

[29] Alienation of property is in the nature of a trust. The fact of its alienation *per se* in this case cannot be criticised. What is absent in the records is the protection of B and J against a circumstance where they could be excluded from A Drive and would not be able to occupy their former home. Counsel for the respondent conceded that there was the omission of an express right for B and J to occupy or

use the assets for life. They were not included in the trust deed as discretionary beneficiaries. There was no protection of the beneficiaries in the event that C, upon becoming sole trustee, might make herself a discretionary beneficiary and transfer the assets of the trust to herself. It is concerning that as a consequence of the Family Trust, J will be put in a position as the sole owner of the trust's property whereby she can through her will, defeat the fundamental wishes both her and B had on distribution of that asset on a 75/25 basis.

[30] The respondent has accepted that she made errors. Those errors of drafting by the respondent were negligent. There was also a failure to meet standards of usual practice such as:

(a) Clear record keeping (extending to adequacy of instructions to her staff).

(b) Not giving written advice especially before the second meeting.

(c) Not providing any adequate report after the signing of the documents.

[31] The Tribunal finds that she was not as careful as she should have been when regard is had to the age of her clients and the need for education as to the meaning of trust and the duties arising.

[32] The respondent has practised for 37 years. Those drafting errors in the documents prepared, the instructions recorded and the generalised nature of the advice found to have been given, are not what should have been expected of a practitioner of such lengthy experience.

[33] The question then is whether or not the negligence that has been found meets the threshold test of being "of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute" In *Lagolago v Wellington Standards Committee*[3] Clifford J said:

[3] *Lagolago v Wellington Standards Committee* [2016] NZHC 2867.

> "[71] …. But the test for s 241(c) negligence is well known. That is, what is required is "more than" mere negligence (noting that mere negligence may now meet the s 214(b) test for unacceptable conduct). Section 214(c) in the Act is equivalent to ss 106(3)(c) and 112(1)(c) of the 1982 Act. I repeat what the Court of Appeal said in the Auckland W of what was then s 112(1)(c) negligence:
>
> > [41] ... It is common ground that not every act of negligence will be such as to warrant disciplinary action. That is plain from the use of the words "of such a degree" which clearly indicate that an assessment of the degree of seriousness of the negligence is required.
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> > …
> >
> > [43] As discussed by the Full Court in Complaints Committee No I of the Auckland District Law Society v C, a distinction needs to be drawn between a charge of professional misconduct under s 112(1)(a) and a charge of negligence or incompetence under s 112(1)(c). Both may reflect on fitness to practise, the need to maintain public confidence in the legal profession, and the objective of protecting the public, but the former will usually require deliberate wrongdoing or gross negligence of the type discussed by Kirby P in Pillai v Messiter. In contrast, a charge against a practitioner under s 112(1)(c) may be established in the absence of deliberate wrongdoing or gross negligence so long as negligence or incompetence is established to such a degree as to reflect on fitness to practise or as to tend to bring the profession into disrepute."

[34] Counsel for the respondent submitted that the following factors should be taken into account in determining that she was not guilty of negligence to the degree required by s 241(c):

(a) She has practised for 37 years without complaint or disciplinary issues.

(b) There is no evidence of frequent negligence or incompetence.

(c) There is no loss suffered.

(d) The errors are remediable and have been resolved.

[35] Counsel for the applicant agreed that the matters complained of were not about frequency but of degree. He submitted that, although the errors were fixable, the first defect, being the failure to confer a life interest, was of such a degree to meet the test. He did accept that the ability to fix the error was a matter that could be weighed in the balance.

[36] The Tribunal has concluded that the threshold test for serious negligence has not been met. It accepts the submissions in that regard made by counsel for the respondent. In particular it has given weight to the fact that the situation was readily fixable. It has taken into account that the creation for J of a life interest in the trust property and making her a discretionary beneficiary in the trust were matters of benefit to her. As a trustee she could have simply co-operated with C to make the required amendments to the deed. No evidence came before the Tribunal that any attempt was made to correct the defects in the Trust Deed or there was no wish by J to do so. It was readily apparent from C's evidence that it was highly likely she would have done whatever was reasonably required to correct any defects to protect all relevant interests.

[37] J could likewise have co-operated with C to appoint an additional trustee and thus avoid the prospect that C on becoming sole trustee could deal with the trust's assets to her personal advantage. In that respect the Tribunal has taken notice of the genuine surprise expressed by C that she could be in such a position. The Tribunal accepts her evidence that she was committed to make sure that distribution of the trust assets would occur as provided for in the trust deed.

[38] The Tribunal does conclude that defects in the trust deed and the errors made by the respondent are such that a finding of unsatisfactory conduct (s 241(b)) must be made. It fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s 12 (a)).

[39] In reaching that conclusion and given the circumstances of the matter, it follows that there was failure by the respondent to meet the standard required of her by Rules 5.3 and 7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[40] Accordingly the charge of unsatisfactory conduct is proved.

[41] The Tribunal endorses the comment by counsel for the respondent that the issues legitimately raised in this matter might have been dealt with at Committee

level were it not for the intransigent stance taken by J about lies, deception and the preference of the interests of C.

[42] The Tribunal directs that written submissions as to penalty be made by the applicant by 24 July 2017. Counsel for the respondent is to reply by 31 July 2017. Penalty will be decided on the papers unless either of counsel requests a hearing.

DATED at AUCKLAND this 14th day of July 2017

BJ Kendall
Chairperson