NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 18

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

On the papers

DATE OF DECISION 16 August 2017

COUNSEL

Mr M Hodge for the Applicant

Mr K Muir and Ms B Webster for the Respondent

REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY

[1] Following its decision of 14 July 2017 that a charge of unsatisfactory conduct had been proved, the Tribunal has considered the appropriate penalty to impose on the respondent having received written submissions from counsel for both the applicant and respondent.

[2] The respondent faced a charge of misconduct. The Tribunal granted the applicant leave to withdraw that charge at the conclusion of all of the evidence. The Tribunal's decision related to finding unsatisfactory conduct as the alternative to a charge of serious negligence.

[3] The Tribunal found that the respondent had negligently made errors in the drafting of a family trust deed by failing to create a life interest in assets for the donors of the property to the trust and to include them as discretionary beneficiaries. The Tribunal also found that the respondent had failed to meet standards of usual practice in respect of clear record keeping, the giving of written advice, and reporting at the conclusion of the matter being transacted.

[4] The Tribunal concluded that the respondent's failures did not meet the threshold test that the negligence was "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".[1]

[5] The applicant has sought the following orders by way of penalty:

(a) Censure;

(b) Fine;

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

(c) An order under ss 156(h) and 242(1)(a) for a contribution to the legal fees of J and C;

(d) Costs.

Level of culpability

1. Applicant's submissions

[6] The submission was that the respondent's unsatisfactory conduct was at the upper end of the range of such conduct when the following facts are considered:

(a) The settlors were not included as discretionary beneficiaries of the trust and;

(b) Were not given a life interest in their home which was being transferred to the trust as its only asset;

(c) Both failures could have had dire consequences such as the settlors being forced to take court action to have a home to live in;

(d) The trust deed as drawn permitted C to take sole control of the trust's single asset following the death of J, such that C could depart from the wishes of B and J following their deaths;

(e) The failure of the respondent to be as careful as she should have been in respect of the advice given and the failure to meet usual standards of practice in respect of clear record keeping, written advice, and adequate reporting following the signing of documents.

[7] Counsel submitted that, taken together, these matters place the unsatisfactory conduct at the upper end of seriousness. He further submitted that it is necessary to look at the adverse consequences that could result from the unsatisfactory conduct rather than analyse whether particular loss has in fact occurred.

[8] Counsel's submission was that this was a case of unsatisfactory conduct at the upper end of seriousness such that a censure should be ordered together with a fine at the upper end of the available limit of $15,000.00.

2. Respondent's submissions

[9] Counsel for the respondent emphasised that the primary function of the Tribunal is not to punish the practitioner but rather to protect and promote the public interest.[2] He submitted that there were six factors that the Tribunal should take into account when determining penalty:

(a) The seriousness of the conduct;

(b) Aggravating features;

(c) Mitigating features;

(d) Deterrence;

(e) Protection of the public and reputation of the profession;

(f) Relevant penalty decisions.

Seriousness of the conduct

[10] Counsel submitted that the starting point for the Tribunal was to identify the seriousness of the offending in the context of professional disciplinary proceedings as a whole. He referred to *Ellis v LCRO & Ors*[3] where it was stated that a finding of 'unsatisfactory conduct' is a finding of wrongful conduct at the lowest end of the culpability scale. He submitted that the respondent's conduct and failures do not warrant a finding that they fall within the upper end of unsatisfactory conduct. He relied on the following:

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[2] *Canterbury-Westland Standards Committee No 3 v Hemi* [2013] NZLCDT 23.
[3] *Ellis v LCRO & Ors* [2013] NZHC 3513 at [44].

(a) The respondent admitted the drafting errors but there was no attempt to benefit C's interests over those of B and J.

(b) The respondent admitted that the trust was structured in such a way to ensure that the house property was protected in the event that either B or J predeceased the other. Thus the "aged care" factor should not be given the weight that the Committee attempted to give it.

(c) The respondent, while acknowledging her failure to give B and J a life interest in the property, says that the omission was a matter that could have been easily rectified through the variation provisions contained in the trust deed.

(d) There was no evidence that J (having taken legal advice) had attempted to vary the trust deed or that C had refused to do so. The fact is that C has agreed to dissolve the trust thus remedying the situation.

Aggravating factors

[11] Counsel submitted that there are no aggravating factors in this case.

Mitigating circumstances

[12] Counsel relied on three primary factors which he submitted had not been acknowledged by the applicant in its submissions. They are as follows:

(a) The respondent's character and previous record;

(b) The fact that no loss has been suffered;

(c) The respondent's acknowledgment of the error and acceptance of responsibility coupled with the fact that there was no dishonesty or improper motive or personal gain on her part.

Character and previous record

[13] The respondent has been in practice for approximately 37 years and has not been the subject of prior complaint. The submission is that she is entitled to considerable credit for that.

No loss and errors are remediable

[14] Contrary to the submissions of the applicant, counsel for the respondent has submitted that this factor is a mitigating factor. He submitted that the applicant has failed to acknowledge that C did not take advantage of J and has proved the trust and confidence that was originally placed in her by B and J and such is not a matter of 'luck' as suggested by the applicant.

Acknowledgment and acceptance

[15] Counsel submitted that the respondent is due considerable credit for having admitted the various errors from the moment she filed her response to the charge and for co-operation with both the Committee and the Tribunal throughout.

Deterrence and protection of the public

[16] Counsel's submission under this factor was that the Tribunal is dealing with errors of omission as against deliberate or conscious misconduct such that there is no need for deterrence. There is no proven risk to the public and likewise no threat to the profession.

Penalty decisions

[17] Counsel has acknowledged that usually there are no cases that are identical, but submitted that cases relating to unsatisfactory conduct where no censure order was made provide some relevance. He referred to *Otago Standards Committee v AOW*[4] and *Auckland Standards Committee 3 v PL*[5]. Both were cases where a finding of unsatisfactory conduct was made. Each case concerned a practitioner of

[4] *Otago Standards Committee v AOW* [2014] NZLCDT 33.
[5] *Auckland Standards Committee 3 v PL* [2016] NZLCDT 12.

long standing and involved circumstances where the need to protect the public did not arise.

[18] In answer to the applicant's submission that the respondent should be censured, counsel has repeated the mitigating factors referred to. He has reminded the Tribunal of the decision of the High Court in *B v The Auckland Standards Committee 1 of the New Zealand Law Society & Ors*[6] which noted:

> "To censure a practitioner is to harshly criticise his or her conduct. It is a means by which the Committee can most strongly express its condemnation of what the practitioner has done, backed up, if it sees fit, with a fine and remedial order".

[19] In his submissions on penalty, counsel for the respondent has repeatedly emphasised that the respondent has been in practice for 37 years with an unblemished disciplinary record.

[20] Since filing those submissions, counsel for the applicant has drawn to the Tribunal's attention that two previous findings of unsatisfactory conduct have been made against the respondent at Committee level. They arose from the same complaint and are:

(a) A failure to provide her file in contravention of a notice under s 147 of the Act; and

(b) Failures in the legal work she provided in respect of the administration of an estate.

[21] The respondent received a fine of $5,000 in respect of the first matter and a further fine of $1,000 in respect of the second matter and a costs order of $2,000. Those were complaints that were decided in April 2012 and July 2012 respectively.

[22] Counsel for the respondent has replied to that information. He advised the Tribunal that he has discussed the information with the respondent whose

[6] *B v The Auckland Standards Committee 1 of the New Zealand Law Society & Ors* HC, CIV-2010-404-8451.

instructions are that she had genuinely forgotten about the findings made against her. Through him she has apologised that she had forgotten the findings against her.

[23] Counsel submitted that, notwithstanding those findings, the respondent has been in practice for 37 years with only one set of circumstances previously leading to any disciplinary issues. It cannot be said that the respondent has demonstrated a pattern of behaviour or that there is a general need to protect the public.

[24] Counsel for the respondent has opposed the making of the orders that the applicant seeks and which are set out in para [5] above. In addition to the submissions that he has made, counsel was critical of the applicant for proceeding with the serious charge of misconduct. He said that he had asked to meet with the Committee on an open basis. The concern was that the Committee was continuing to argue that the respondent had acted deliberately against the interests of B and J and that the errors in the trust deed constituted misconduct. That request was refused. He said that the Committee had taken the position that the Tribunal needed to hear from the parties to determine what really had happened.

[25] Counsel's submission was that a two day hearing could have been avoided.

[26] While the Committee has argued that it was only when C was cross-examined that the further information came out leading to the conclusion that both B and J knew what they wanted and that there was no evidence to prove that C's interests were being preferred over those of B and J. Counsel for the respondent submitted that it would have been a simple matter for the Committee to have discussed the matter with C. He submitted that J's allegations were serious and focussed in the main on C's conduct. Had such an enquiry been made then the charges would not have been laid.

[27] Counsel for the respondent has thus submitted that there should be no order for censure, fine or costs.

Rectification of errors

[28] The applicant seeks an order under s 156(1)(h) that the respondent contribute to the costs incurred by J and C in rectifying the errors that have occurred.

[29] Counsel for the respondent opposes the making of such orders. The submission is that there is no evidence as to the costs that either J or C have incurred. In addition there is no evidence as to the advice J received or of any attempt by her to negotiate a variation to the deed or to have taken the simple step of appointing a new trustee by way of her will. The argument was that such steps would have been cost effective options. Rather, he submitted, J was more focussed on retribution for her perceptions of dishonesty, deception and deliberate conspiracy against her.

[30] The Tribunal has taken into account that it would have been relatively simple for the errors to have been rectified were it not for the intransigent stance taken by J. It declines to make the order for compensation sought.

Costs

[31] It was the submission of counsel for the applicant that an order for full costs should be made in the sum of $38,482.80. His primary submission was that notwithstanding the Tribunal's expressed view that the issues in this matter might have been dealt with at Committee level, a hearing was necessary to resolve the significant factual disputes and that those were resolved only after C had been cross-examined. Counsel has argued forcefully for the making of the order and stressed the following:

(a) Costs are a live issue whether at Committee level or before the Tribunal;

(b) A hearing at Committee level would have been required to resolve the difference between the parties account of events;

(c) The fact of the new evidence essentially from C which came out at the hearing for the first time is relevant to the assessment of costs;

(d) That in any event costs should be awarded against the respondent because:

i. It was conduct that was plainly unsatisfactory;

ii. That the respondent's single failure of excluding B and J as beneficiaries and life tenants was a deliberate decision on her part as to how to structure the arrangements;

iii. The inadequate record keeping of the respondent contributed significantly to the difficulty in ascertaining what occurred in the case;

iv. A hearing was required to dispose of the complaint whether it was referred to the Tribunal or not given the nature of the complaint; the fact that the arrangements put in place were not in the best interests of B and J; the sharp divergence in the accounts given as to what occurred and the lack of meaningful assistance to be gained from the respondent's records.

Discussion

[32] The starting point for the consideration of penalty is the advancement of the public interest; maintenance of professional standards; the imposition of sanctions on a practitioner for breach of his or her duties; and to provide scope for rehabilitation in appropriate cases. (*See Daniels*)[7]

[33] The Tribunal reminds itself of the "least restrictive intervention" as articulated in the *Daniels* decision.

[34] The conduct of the respondent has been found to be at the low end of the scale and does not call for censure or a fine. We have not found that the respondent acted deliberately in creating the trust deed with the resultant effects on B and J that

[7] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2013] 3 NZLR 850.

have been described and argued for. The errors described were capable of simple rectification.

[35] The Tribunal has considered that the complaint could have been considered at Committee level by the simple expedient of enquiring of C what her views were on the matter. It has taken into account that there would be costs in an enquiry at that level and that the respondent's previous disciplinary history would be relevant.

[36] The Tribunal has, by a majority, come to the conclusion that the respondent should be subject to an order for costs. It fixes costs at two-thirds being $25,655.20.

[37] The respondent has asked for an order that her name not be published. Her counsel has repeated his submissions in respect of her years in practice and the fact that the matter should have been dealt with before the Committee which had the power to investigate and make appropriate orders. He submitted that it would be unfair to allow publication because the Committee elected to lay charges.

[38] The Tribunal has decided that publication should occur as is usual in disciplinary matters given that this is the third finding of unsatisfactory conduct against the respondent.

[39] The application for non-publication of the respondent's name is declined.

[40] There will be an order for the non-publication of the name and identifying details of the complainant J, and her family members, including C.

Summary of orders

1. The respondent is to pay the applicants costs in the sum of $25,655.20.

2. There is an order for the non-publication of the name and identifying details of the complainant and her family members together with those of C.

3. The New Zealand Law Society is to pay the costs of the Tribunal (s 257 LCA). The s 257 costs are certified at $6,214.

DATED at AUCKLAND this 16th day of August 2017

BJ Kendall
Chairperson