NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 21

LCDT 017/17

BETWEEN **AUCKLAND STANDARDS COMMITTEE 5**

Applicant

JOHANNES FRANCISCUS Van NOORT

Practitioner

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr S Maling

Ms C Rowe

Mr W Smith

Mr B Stanaway

HEARING at the District Court, Auckland

DATE 30 & 31 August 2017

DATE OF DECISION 6 September 2017

COUNSEL

Mr M Hodge for the Committee

Practitioner in Person

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

[1] At the commencement of the hearing of the charge of misconduct against the practitioner, he indicated his wish to plead guilty to a lesser charge.

[2] The Tribunal afforded time for discussion between counsel and the practitioner. Those discussions resulted in a written and signed summary of agreed facts and admission of charge which is attached as appendix A.

[3] The Tribunal accepted that summary and satisfied itself that the arrangement was appropriate. It accepted the practitioner's plea of guilty to a charge of negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise or as to bring the profession into disrepute (s 241 (c) of the Lawyers and Conveyancers Act 2006 (the Act)). It granted the applicant leave to withdraw the primary charge of misconduct.

[4] Stated simply, the practitioner's negligence arose because he entered into a lease agreement with his clients in respect of their small farm property, and on which he was to embark on a wine growing enterprise.

[5] The practitioner has acknowledged that in doing so he breached Rule 5.4.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which expressly prohibits a lawyer from acting for a client in any transaction in which the lawyer has an interest. That prohibition is eased if the matter is not contentious and also if the interests of the lawyer and client correspond in every respect. The facts of this matter do not allow for the application of that part of the rule.

[6] The Tribunal heard submissions on penalty from counsel for the Committee and from the practitioner in reply. It determined that the orders recorded in para [17] be imposed.

[7] This decision sets out the Tribunal's reasons for the penalty imposed on the practitioner.

[8] Counsel for the Committee submitted that a short period of suspension should be imposed on the practitioner. His negligence was a serious departure from professional behaviour. That departure called not only for the personal penalty of suspension but suspension was necessary to emphasise generally to the profession the need to maintain proper standards.

[9] Counsel for the Committee further submitted that the conflict of interest which the practitioner faced was one where that conflict "screamed out" to him. There was no room for ambiguity. This was a personal transaction between himself and the client.

[10] Counsel has referred to the decision of the English Court of Appeal in *Longstaff v Birtles,*[1] where it was said:

> " …..that in the context of the relationship the proposal gave rise to a situation in which the duty of the solicitors might conflict with their interest; and that they acted in breach of fiduciary duty in continuing to deal with the Longstaffs, in a situation of a conflict of duty and interest, without insisting that they obtain independent advice".

[11] In the same context in New Zealand, is the decision of the Court of Appeal in *Sims v Craig Bell & Bond*[2]. It described the case as illustrative of the problems that may arise when a lawyer mixes private commercial pursuits with professional responsibilities. When discussing the need to avoid conflict of interest between the lawyer acting and the client, emphasis was placed on the entitlement of the client to disinterested advice, full disclosure of what is involved and what the consequences might be. It said at page 546, line 21:

> "A solicitor who is himself to benefit financially from the transaction may be hard put to show that he himself has been able to give advice of that kind".

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[1] *Longstaff v Birtles* [2002] 1WLR 470 at 477 at [35].
[2] *Sims v Craig Bell & Bond* [1991]3 NZLR 535.

[12] Counsel referred to the Tribunal's decisions in *Monckton*[3] and *Mr M*[4] in which a short period of suspension was imposed in Monckton. A fine and censure were imposed on Mr M.

[13] Counsel fairly acknowledged that it was open to the Tribunal to follow the course adopted in respect of Mr M and impose a penalty of fine and censure with consequential orders as to costs.

[14] The practitioner advised the Tribunal that he accepted what counsel for the Committee had said in his submissions. The practitioner then submitted:

(a) That in his mind he wanted to make sure that his clients knew what they were getting into;

(b) That he was giving them the best deal especially by providing in the lease that the buildings and vineyard would be given to them if he died;

(c) That he was not seeking a real advantage for himself.

[15] The practitioner stated that he had paid a heavy price arising out of this transaction and by allowing his enthusiasm for the venture to override his professional responsibilities or to blind him to them.

[16] We have taken the approach of the least restrictive intervention[5] in deciding that a period of suspension is not called for. We do so having taken into account that:

(a) There was no dishonesty on the part of the practitioner;

(b) He overlooked his professional responsibilities in the excitement of the prospect of becoming a wine maker;

(c) He has resolved all issues with his former clients;

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[3] *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.
[4] *Waikato Bay of Plenty Standards Committee 2 v Mr M* [2016] NZLCDT 24.
[5] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2013] 3 NZLR 850.

(d) The clients have withdrawn their complaint against him before the commencement of these proceedings.

[17] We record the orders that we made at the conclusion of the hearing:

(a) Censure;

(b) A fine of $5,000.00;

(c) An order to pay $20,000.00 costs in favour of the Law Society;

(d) An order to refund to the Law Society the costs of the Tribunal pursuant to s 257 and which are certified at $6,743.00;

(e) The names of the complainants and their witness are not to be published.

[18] The practitioner was censured as follows:

Mr Van Noort

You are before the Tribunal today having admitted a charge of negligence under s 241(c) of the Act which reflects on your fitness to practise as a lawyer and tends to bring the profession into disrepute before the public.

Simply put you entered into a lease with your clients which placed you in direct conflict with Rule 5.4.3 which says:

> A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.

You were hopelessly conflicted and you should have known it.

You are censured accordingly.

DATED at AUCKLAND this 6th day of September 2017

BJ Kendall
Chairperson

Appendix A

Summary of agreed facts and admission of charge

1 The complainants in this matter are PE and PA (**complainants**). In February 2015 the complainants owned a farm property at M Road, P (**property**) where they lived with their three children.

2 The practitioner was a sole practitioner practising as Sanctuary Trust Law.

3 The complainants were referred to the practitioner by a friend in February 2015, and first met the practitioner in a meeting on 6 March 2015. The complainants first engaged the practitioner to set up a family trust.

4 Between March 2015 and February 2016 the practitioner set up the M Family Trust (**Trust**) for the complainants, acted to secure the complainants a personal loan, transferred legal title to the property to the Trust, and drafted wills for each of the complainants.

5 In January 2016 the complainants decided to move permanently to Australia when PA was offered permanent employment.

6 On 3 February 2016, PE contacted the practitioner by email to organise a meeting to make sure all legal matters were finalised before they departed, and to seek advice regarding removal of a covenant. The practitioner responded that, by coincidence, he had documents for her sign.

7 PE met the practitioner at the property on 5 February 2016. PE signed documents that the practitioner had prepared but at that time the practitioner had not yet finalised enduring powers of attorney for signature by the complainants. This was dealt with after the meeting.

8 During the course of the meeting on 5 February 2016 the possibility was raised of the practitioner leasing part of the property from the complainants to use as a vineyard. PE discussed the idea with PA after the meeting, and they invited the practitioner to send his ideas through to PA.

9 The practitioner maintains that he told PE on 5 February 2016 that "all matters in the trust had now been finalized, and [he] was no longer involved and that [he] would no longer charge them, as the work situation had ended." However, the practitioner accepts that his conduct, including his emails with the complainants referred to below, left room for confusion about the nature of his role in relation to the lease of the property.

10 Between 5 February 2016 and 15 February 2016 the practitioner and the complainants exchanged a number of emails, mainly addressing the practitioner's plans for the property and the lease required accordingly, but also dealing with the enduring powers of attorney. This included the following:

(a) On 8 February 2016 the practitioner emailed the complainants advising that he had now prepared enduring powers of attorney, which were to be sent through to the

complainants (which was done by the practitioner's secretary on 9 February), and also setting out his ideas for the use of the property.

(b) On 11 February 2016 the practitioner emailed with a proposed set of arrangements for the lease. This email included advice regarding possible tax options and proposed various terms for the lease. The email also provided some advice on risks, namely the risk to the practitioner if he were to die or become incapacitated prior to the expiry of the lease and the risk to the complainants if they wished to sell the property.

(c) On 11 February 2016 PA replied positively to the practitioner's proposals but with some questions for the practitioner, including in relation to the possibility of a business partnership and in relation to the location of the barn on the property. PA advised that he was returning from Australia on 26 February 2016 and departing again on 29 February 2016.

(d) On 15 February 2016 the practitioner emailed the complainants detailing further plans he had for the property, and provided a reply to the question asked by PA in relation to the location of the barn on the property. The practitioner also advised that he would send through a draft lease for the complainant's perusal. The practitioner did not do this prior to the meeting he had with the complainants to sign the lease on 27 February 2016.

(e) On 15 February 2016 PE replied confirming a meeting with the practitioner for 27 February 2016. PE advised that she would be picking PA up from the airport at 6am that morning and that their focus on 27 and 28 February was their businesses and arrangements with the practitioner so that they could then leave New Zealand "knowing exactly where we all stand and where we are headed".

11 At the meeting on 27 February 2016 the Complainants and the practitioner signed a Deed of Rural Lease, which had been drafted by the practitioner, in the presence of the complainants' friend and accountant, R. The second schedule to the Deed of Lease included the following term:

> INDEPENDENT LEGAL ADVICE
>
> Parties confirm that each one of them has had the opportunity of taking independent legal advice on the matters set out in this lease, and that they have decided not to take such advice, and are prepared to be bound by the terms of the lease.

12 The practitioner discussed the terms of the Deed of Lease with the complainants including the term just set out. The practitioner maintains that the complainants were asked at that point whether they wished to proceed to sign the lease and they confirmed they were happy to do so. The practitioner accepts that he did not explain to the complainants his conflict of interest and that he did not insist or otherwise take steps to ensure that the complainants receive independent legal advice before signing the Deed of Lease.

13 The complainants left New Zealand for Australia on the morning of 29 February 2016.

14 On 22 March 2016, PE emailed the practitioner seeking advice on a rental agreement with another tenant at the property, and asking the practitioner to invoice the complainants for

his time. The practitioner did not respond to this email and says he did not receive it, but the email shows that the complainants still viewed the practitioner as their lawyer.

15 On 1 August 2016, PE emailed the practitioner advising that the complainants would be selling the property. In one of the following emails the practitioner offered to prepare tax forms so the property was ready for the purchasing solicitor, without charge.

16 Problems then arose with the complainants being led to understand that the practitioner had been obstructing viewers and putting them off purchasing the property. The practitioner denied that he had taken such action. The relationship between the practitioner and the complainants quickly deteriorated, with the practitioner lodging a caveat on the title to the property to protect his leasehold interest.

17 The real estate agent instructed on the sale of the property informed the complainants that potential purchasers had informed him that they were unable to purchase the property with the lease in place as they viewed it as a one-sided arrangement which heavily favoured the practitioner.

18 A legal dispute between the complainants and the practitioner ensued. The complainants issued the practitioner with a breach notice on 8 September 2016, which the practitioner denied. The Complainants and the practitioner were ultimately able to reach a confidential settlement of their dispute in November 2016.

19 The practitioner accepts that in his excitement about the prospect of a new vineyard and winery business at the property he did not take care to take the steps that he should have. The practitioner accepts that he acted as a business person, forgetting his role as a legal professional.

20 The practitioner has accordingly admitted Charge Two of the charges dated 15 May 2017 under s 241(c) of the Lawyers and Conveyancers Act 2006 on the basis of Particulars 1 (repeating particulars 1 to 20 of Charge One) and 2 of Charge Two.