NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 24

LCDT 020/17

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 5** Applicant
AND	**BRIAN ROBERT ELLIS** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Mr G McKenzie

Ms S Sage

Mr W Smith

HEARING 12 and 13 July 2018

HELD AT Specialist Courts and Tribunal Centre, Auckland

DATE OF DECISION 23 July 2018

COUNSEL

Mr P Collins for the applicant

Mr W Pyke for the respondent

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

[1] The respondent is charged with misconduct under s 241(a) of the Lawyers and Conveyancers Act 2006 (the Act). There are two alternative charges: unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct (s 241(b) of the Act), and negligence or incompetence of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute (s 241(c) of the Act).

[2] Particulars of the charges are set in full in Appendix 1 to this decision.

[3] The applicant has summarised the respondent's alleged misconduct as being:

(a) His persistent failure to comply with his reporting obligations under reg 12(7) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations).

(b) Retaining possession of trust funds after the retainer with his client had ended and dealing adversely with those funds when he deducted fees in March 2016.

(c) Misleading his client by informing that her account with his firm was cleared.

[4] The applicant alleges that the respondent was guilty of misconduct in the categories:

(a) Under s 7(1)(a)(i), being conduct that would be reasonably be regarded by lawyers of good standing as disgraceful and dishonourable; and

(b) Under s 7(1)(a)(ii), being conduct consisting of wilful or reckless contravention of reg 12 of the Regulations and s 110(1) of the Act.

[5] In an amended response to charge dated 11 July 2018, the respondent admitted the charge of unsatisfactory conduct but continued to deny the charges of misconduct and negligence or incompetence.

Background

[6] Ms B entered into a retainer with the respondent from a date in August 2009 regarding New Zealand and Australian public company shares held by her deceased cousin (late of Israel) of which she wished to obtain the benefit. The precise date of the retainer is disputed.

[7] The discussion between the client and the respondent focused on the establishment of a family trust with the intention that the shares would be transferred to the trustees.

[8] By July 2011, there was no progress with establishing the trust. The client sent the respondent an email on 5 July 2011 in which she set out the difficulties that had arisen in establishing the trust. She expressed her dissatisfaction about the fee invoice that the respondent had rendered to her in August 2010 in the sum of $4,281.75 including disbursements. That dissatisfaction was against the fact that she had been initially quoted a fee estimate of $1,500 including GST and disbursements. Her email went on to advise termination of the retainer. The relevant words of which are:

> "Due to circumstances and the fact that there is no other solution to my issue besides setting up a trust, (at least that has been my understanding from all our communications) I have decided to ask you to close my file. I will be coming to collect it from your office. ....."

[9] The respondent replied to his client by email on the same day as set out below:

> "Dear M…
>
> Thank you for your email earlier today.
>
> At the moment you (sic) account with Ellis Law is cleared. However, before you uplift the files there are a number of matters that need to be considered and some work done.

> First of all, you need to remember that all cheques that are now coming in are made payable to "Estate N M A.". We can bank them but I would question how you will be able to bank them yourself without matters being finalized and regularized
>
> We would also need to write to each of the companies and get the letters and cheques re-addressed.
>
> I take it you have finished studying? If so, is there any reason why the shares cannot be transferred to your name? That would be far easier.
>
> In any event, you cannot get away from the point we have previously made, namely that to get the Australian shares transferred to whoever they are to be transferred to you need to get Probate for Ms A.
>
> My advice is simple but firm. Get the Probate from Israel. Decide who is to hold the shares – you or someone on your behalf as trustee and then finalize the outstanding matters. The longer it takes, the more messy and difficult it is likely to become.
>
> Regards"

[10] Ms B responded by email on 7 July 2011:

> "Thank you Brian for the points you raised.
>
> I will reconsider my decisions."

[11] Nothing further happened between Ms B and the respondent. The client did not call to uplift her file. No legal work was undertaken by the respondent. The file lay dormant with the respondent.

[12] On 9 March 2016 (four years and eight months later), the respondent sent Ms B a fee invoice for $1,300 plus GST and disbursements. The total sum billed was $1,595.63. There was an accompanying statement[1] showing *"Funds currently held on term deposit" $2,528.42.* The respondent had deducted the fee of $1,595.63 leading to the narration on the statement "*Balance of funds held on account"* $932.79.

[13] Ms B protested the fee invoice in an email dated 22 March 2016 to the respondent. She expressed surprise about the funds the respondent was holding. She pointed out that she had heard nothing from him "*over the last five years".* She

[1] Page 26, BoD.

went on to express concern that he had been holding her funds for that time without contacting her.

[14] The respondent did not reply to that email from Ms B nor to her follow up communications of 29 May and 15 August 2016.

[15] Ms B made a complaint to the Lawyers Complaints Service on 4 November 2016.

[16] The respondent refunded $2,528.42 to Ms B by two payments which he made in December 2016.

[17] In addition to the sums mentioned above, there was an additional invoice dated 22 June 2011 for $810.18 described as being for professional services since 10 September 2010. Ms B gave evidence that she did not receive that invoice and that the first time she saw it was on the evening of 11 July 2018 when she received a copy of the respondent's supplementary affidavit which he swore and filed on 11 July 2018[2].

[18] In that affidavit, the respondent exhibited a copy of the invoice and said that it was posted to Ms B under covering letter of 22 June 2011. He deposed that he deducted the sum on authority of the terms of engagement and because Ms B had expressly authorised him to do so in her email dated 16 September 2010 where she said "*I was happy about the opportunity to be able to use the dividends to pay some of my debt to you. If there are other similar incoming funds, please use them to reduce my debt to you".*

[19] It has to be noted that that instruction was given before the invoice for $810.18 was created and that it referred to her outstanding fees created by the invoice rendered in August 2010 (paragraph 8).

[20] The respondent has deposed that he will refund the amount of $810.18 with interest at the current rates for trust monies applicable since the sum was deducted.

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[2] NoE p 18, line 11.

This is in keeping with his earlier decision regarding the amount of $2,528.42 discussed in paragraph 12.

Issues

[21] There are two areas of disputed facts. They are:

(a) Whether the respondent provided written terms of engagement to Ms B: and;

(b) The date upon which Ms B's retainer with the respondent was terminated.

[22] The respondent deposed that a copy of the terms of engagement were posted to Ms B on 12 August 2009. He attached a copy of a letter dated 12 August 2009. When cross-examined about that, the respondent said that he does not personally send out terms of engagement letters but leaves that task to a member of staff.[3] There is no record produced of the posting having been made.

[23] Ms B maintained that she did not receive a copy of the terms of engagement.

[24] The applicant has commented that the dispute about that is not seen as being particularly important because the respondent's standard terms of engagement do not say much of relevance to the charge.

[25] As to the date of termination of the retainer, the applicant argues that Ms B's email of 5 July 2011 effectively terminated the retainer.

[26] The respondent argues that the retainer did not terminate until March 2016. His assertion is that he had a residual continuing retainer as a fiduciary in relation to dividends received by his practice.

[3] NoE p 37, line 6.

[27] We have found that it is unnecessary to make findings on the two areas of disputed facts for the reasons that follow.

Decision

[28] The respondent has made the following admissions:

(a) That he should have communicated with Ms B sooner than March 2016 having not heard from her since her email message of 5 July 2011 and that he had let her down in failing to report in a timely fashion about the receipt of dividends after that date.

(b) He acknowledged effective follow-up of Ms B would have been achieved by accounting to her as required by reg 12(7) of the Regulations and by a similar obligation accepted in his terms of engagement.[4]

(c) That his fee invoice of 9 March 2016 was substantially unjustified and contained elements of duplication of the earlier fees invoice of 22 June 2011.

(d) That he delegated much of his trust accounting and administrative responsibilities to staff members and that sometimes he gets let down.[5]

(e) That he was not well acquainted with the Regulations.

[29] The respondent is the trust account supervisor with responsibilities under reg 16(4) of the Regulations. He acknowledged his lack of supervision in that regard.

[30] The respondent has through his counsel submitted that the breaches of the Regulations can be marked by a finding of unsatisfactory conduct under s 12(c) of the Act or, at worse, a finding of misconduct based on a reckless breach of the Regulations

[4] NoE p 40 and 42.
[5] NoE p 47, line 5.

under s 7(1)(a)(ii) of the Act. It was also submitted that no loss has occurred and sound advice was given which advice was not complained of.

[31] Counsel for the applicant submits that the respondent was guilty of misconduct under both s 7(1)(a)(i), disgraceful and dishonourable conduct, and s 7(1)(a)(ii), the reckless contravention of reg 12 of the Regulations and s 110(1) of the Act. He relies on the following:

(a) The respondent's persistent failure in his reporting obligations under reg 12(7), to have provided Ms B with a complete and understandable statement of all trust money held for her at intervals of not more than 12 months.

(b) He failed to acquaint himself with the most basic of trust accounting responsibilities.

(c) Had the respondent complied with his reporting responsibilities, then issues concerning termination of the retainer would have been resolved.

(d) The delegation by the respondent of many of his trust accounting responsibilities is an aspect of the wilful and reckless character of his conduct having regard to reg 16(4) of the Regulations.

(e) His adverse dealing with trust funds of Ms B of which she had no knowledge or information and the deduction of a fee in March 2016 acknowledged by the respondent to be largely unjustified.

[32] The respondent's responsibilities towards Ms B arise by virtue of the fact that he held trust money for her. Regulation 3(1) of the Regulations defines client as including any person on whose behalf money is held by the practice. Section 110 of the Act creates obligations on a practitioner in respect of money received on behalf of any person. It follows that the respondent had obligations towards Ms B regardless of whether or not she continued to be a client or that the respondent saw himself as a

fiduciary. He held money on her behalf as a person and thus the obligations created by the Regulations and s 110 of the Act arose.

[33] The Tribunal takes into account the cumulative effect of the respondent's breach of the regulations; the admitted substantially unjustified fee of March 2016; and the length of time over which the breaches occurred. It reaches the conclusion that the charge of misconduct under s 7(1)(a)(i) and s 7(1)(a)(ii) is established.

Directions

1. The applicant is to file submissions as to penalty within 14 days of the release of this decision.

2. The respondent is to file submissions as to penalty within a further 14 days.

3. Counsel are to consult with the Tribunal Case Manager to allocate a date and time to consider penalty.

DATED at AUCKLAND this 23rd day of July 2018

BJ Kendall
Chairperson

Appendix 1

Particulars:

1. Brian Ellis is and was at all relevant times a barrister and solicitor practising on his own account as Ellis Law at Auckland.

2. Between 26 August 2009 and 5 July 2011 Brian Ellis acted for Ms B on her instructions to establish a family trust, and to collect income from public company shares to which Ms B was entitled and which were intended to be transferred to the Trust.

3. While acting for Ms B on those instructions, he received share dividends and deposited those dividends into his trust account.

4. On 30 August 2010 Brian Ellis submitted a fee invoice to Ms B for $4,281.75 including GST and disbursements. During the period 31 August 2010 to 29 June 2011 he deducted fees or purported fees from Ms B's ledger in his trust account to a ledger described as "Account Receivables Firm's Trust Accounts", from funds paid by Ms B for fees and from dividends receipts, in the total amount of $5,091.93. He did not provide any accounting or explanation to Ms B and she was unaware of the purported fee deduction in that amount.

5. In an email on 5 July 2011, at 5.40pm, Ms B terminated the contract of retainer with Brian Ellis. The text of that email is stated in full (with bolded print in the original):

> "I have had some time to assess my situation and consider my possibilities. The present state of affairs is as follows:
>
> It now seems unlikely that I can set up a trust:
>
> 1. My son is overseas and my daughter would be studying overseas in the coming academic year. That leaves me with no other persons to serve as trustees.
> 2. Additionally, some shares have lost much of their value, or completely [PR], and the legal costs so far (already around $5,000) plus what I can still expect if I continue on this path, have made a trust unsustainable for me at this moment in time. The costs I have paid to date are far from the initial estimate of $1,500 that you gave in our first meeting for setting up a trust, which seemed affordable for any budget. So far, I have been borrowing money to pay you off.
> 3. I emailed your office four or five times since your last communication in January this year, as you did not give me the total sum owed to you and what the disbursements you alluded to are, neither did I get any response on that from your receptionists, I paid the amount of $ 632.50 ($ 550 + GST) on April 18th, this being the amount you mentioned in your correspondence. I wanted to avoid unnecessary accumulation of debts. Yet, I had no clue of the disbursements. **Please advise what that amount is so that I complete paying all your due fees.**
>
> Due to circumstances and the fact that there is no other solution to my issue beside setting up a trust, (at least that has been my understanding from all our communications) **I have decided to ask you to close my file. I will be coming to collect it from your office. Please ensure that it includes the original of N's death certificate and of the legal agreement signed overseas.**

> At this stage I am involved in voluntary work as a counsellor (as I still do not have paid employment) and find it difficult to maintain ongoing legal costs for which I need to borrow money.
>
> I will need to notify ASB Securities to direct the mail to myself in the future."

6. Brian Ellis responded by email the same day, 5 July 2011, at 7.55pm saying:

> "Thank you for your email of earlier today.
>
> At the moment you account with Ellis Law is cleared. However, before you uplift the files there are a number of matters that need to be considered and some work done.
>
> First of all, you need to remember that all cheques that are now coming in are made payable to "Estate N M A". We can bank them but I would question how you will be able to bank them yourself without matters being finalized and regularized.
>
> We would also need to write to each of the companies and get the letters and cheques re-addressed.
>
> I take it you have finished studying? If so, is there any reason why the shares cannot be transferred to your name? That would be far easier.
>
> In any event, you cannot get away from the point we have previously made, namely that to get the Australian shares transferred to whoever they are to be transferred to you need to get Probate for Ms A.
>
> My advice is simple but firm. Get the Probate from Israel. Decide who is to hold the shares – you or someone on your behalf as trustee and then finalise the outstanding matters. The longer it takes, the more messy and difficult it is likely to become."

7. Ms B sent an email to Brian Ellis on 7 July 2011 saying *"Thank you Brian for the points you raised. I will reconsider my decisions"*.

8. Ms B had no further contact with Brian Ellis, having terminated the retainer and having taken steps to receive the share dividends directly, until 9 March 2016 when she received from him:

   (a) A covering letter reading:

   > *"You will recall we last corresponded in 2012 in relation to various matters concerning your affairs.*
   >
   > *Since September 2010 we have received dividends from you, we have sent you letters of advice from time to time as well as extensive emails. However, on looking at our files, we note we have never finalised matters. Nor have we received instructions from you as to how to deal with the balance of your trust funds.*
   >
   > *We now enclose our account for our professional services. We also enclose a statement. You will see there is a balance of $932.79 remaining on deposit. We suggest you let us know where you would like this sum deposited to avoid additional costs accruing."*

   (b) A fee invoice referring to purported services since 2010, for $1,595.63 including GST and disbursements; and

(c) A statement of account disclosing "funds received and held on deposit" in the amount of $2,528.42 and referring to a remaining balance of funds after the deduction of the fee, in the sum of $932.79.

9. By email on 22 March 2016 Ms B disputed the fee invoice and demanded repayment of the amount $2,528.42 and interest. Brian Ellis did not reply and Ms B corresponded with him further, by email on 29 May 2016 and by registered letter on 15 August 2016. Brian Ellis did not reply to any of that correspondence.

10. On 8 November 2016 Ms B submitted a complaint to the Lawyers Complaints Service and in December 2016 she received two payments from Brian Ellis in the total sum of $2,528.42, without any accounting or other explanation.

11. In the circumstances described in the particulars 1 – 9, Brian Ellis:

(a) Failed to account to Ms B for funds held on her behalf, from 5 July 2011, either by reference to Regulation 12(7) of the Lawyers and Conveyancers Act (Trust Account Regulations) 2008, or at all;

(b) Failed in his duty to hold and pay Ms B's funds in accordance with her directions, contrary to s.110(1)(b) of the Act;

(i) By failing to account to her for share dividends he held at the time she terminated the retainer on 5 July 2011;

(ii) By failing to account to her for share dividends he received and held after 5 July 2011; and

(iii) By applying dividends in payment of the fee invoice dated 30 August 2010 in a sum exceeding the fee invoice, in the manner described in Particular 4.

(c) Charged Ms B a fee in the amount of $1,595.63 including GST and disbursements by invoice dated 9 March 2016, in the absence of a contract of retainer permitting him to charge a fee and without having undertaken any authorised legal work; and

(d) Deducted that fee from Ms B's funds then in his trust account; without authority and in the absence of a contract of retainer, and contrary to s.110(1)(b) of the Act;

(e) He engaged in conduct that was misleading and deceptive of Ms B contrary to Rule 11.1.