NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 19

LCDT 011/18 and 005/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**MURRAY LAWES** Practitioner

CHAIR

Judge DF Clarkson

MEMBERS

Ms N McMahon

Mr S Morris

Ms S Sage

Mr W Smith

DATE OF HEARING 1 May 2019

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 19 July 2019

COUNSEL

Mr R Moon for the Standards Committee

Practitioner in person

RESERVED DECISION OF THE TRIBUNAL AS TO LIABILITY

Introduction

[1] Mr Lawes faces a charge of misconduct (with alternatives of negligence or unsatisfactory conduct) in each of two proceedings which were, by consent, heard together.

[2] The first charge concerned the management and reporting of the practitioner's trust account.

[3] The second charge concerned his conduct in relation to an estate, against which one of his clients was claiming. Mr Lawes placed funds from the sale of stock on the estate's farm property into his trust account, and later deducted fees from those funds.

[4] Despite requests by the estate solicitors, the practitioner refused to remit the funds to them, or explain the fees. Mr Lawes claimed his client had a dispute concerning the funds, which was still before the Family Court, thus he had no obligation to remit the funds as requested.

Issues

[5] The issues to be determined are as follows:

Charge 1

1. Do the failings found, or admitted, constitute a reckless or wilful breach of the trust account regulations, such as to amount to misconduct (s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (the Act))?

2. If not, are his actions such as to establish negligence or incompetence such as to satisfy the definition in s 241(c) of the Act?

3. If not, has a straightforward breach been established such as to amount to unsatisfactory conduct (s 12(a), (b) or (c) of the Act)?

Charge 2

4. (a) Did Mr Lawes have the right to charge fees to the estate of A?

   (b) If not, does his deduction of fees without authority of the executors, and failure to explain his fee promptly, amount to misconduct (s 7(1)(a)(ii) of the Act), or one of the lesser charges pleaded?

5. Did Mr Lawes have reasonable ground to retain the funds claimed, by the solicitor for the executors, to belong to the estate of A?

6. If not, what is the correct level of culpability, misconduct, negligence or unsatisfactory conduct?

Background to Charge 1

[6] Mr Eben Kitching on behalf of New Zealand Law Society (NZLS) reviewed the trust account of the practitioner on 11 December 2017. He identified the following non-compliances which were detailed in a written report to the practitioner dated 21 December 2017:

(a) failure to maintain a control account (cashbook) in relation to trust account transactions, in breach of reg 11(1) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations);

(b) failure to complete a month end trial balance for each client matter in breach of reg 11(3)(b) of the Regulations;

(c) failure to maintain an interest bearing deposit account (IBD) control account in breach of reg 11(1) of the Regulations;

(d) failure to reconcile the IBD bank account on a monthly basis in breach of reg 11(3)(b) the Regulations;

(e) failure to provide a statement to clients with ongoing trust account balances at least annually in breach of reg 12(7) of the Regulations;

(f) failure to provide monthly (four) and quarterly (three) certificates within the prescribed timeframe on seven occasions between January 2017 and November 2017 in breach of reg 17 of the Regulations;

(g) failure to return credit balances to clients at the conclusion of a matter in a timely manner in breach of r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules);

(h) failure to administer a controlled bank account for Ms F in accordance with s 111(1) of the Act and/or reg 11 of the Regulations;

(i) charge of an office service fee for faxes, photocopies and sundries on 15 invoices under the heading 'Disbursements' when the disbursements were not payments made on behalf of clients to third parties and failure to disclose this charge in the client care information.

Consideration of the Failures

(a)

[7] The practitioner's response to failure (a) was that reg 11(1) did not require that a control account (cashbook) be maintained. He said in his affidavit dated 21 December 2018 that he checks his trust account on a daily and often on a number of times during the day. He receives a print out of the trust account every second or third day when the trust accountant reconciles the trust account for that period. He also receives hard copies of his trust account bank statements from his bank every week. He described in detail the process around trust account receipting which he said he does on a daily basis. He also notes that he is the only person authorised to make payments from his trust account and sign cheques and therefore he had an intimate knowledge of the trust account transactions.

[8] Mr Lawes accepted that three reviews of his trust account had stated the absence of a cashbook was a problem.

[9] In summary, the practitioner considered that his processes satisfied the requirements of s 112(2) of the Act. He also said that he has now adopted the practice of maintaining a cashbook.

[10] The Tribunal disagrees that Mr Lawes' previous practices were adequate. Section 112(1) of the Act requires records in respect of trust accounts to be kept "in such a manner as to enable those records to be conveniently and properly audited or inspected".[1] We have no difficulty in concluding that the practitioner failed to comply with s 112(1) of the Act. We do not consider that the practitioner's internal administration is such that it enabled the trust account to be conveniently and properly reviewed by the inspectorate so as to satisfy the requirements of the Act.

(b)

[11] The practitioner's response to failure (b) is that he did not understand the allegation. He said that his trust account is always reconciled/balanced at the end of the month and that a new balance for the following month is started based on the previous month's balances. In support, the practitioner provided a copy of his month end trial balances for each client.

[12] In reply in his affidavit of 28 February 2019, Mr Kitching commented that the end of month balances provided by the practitioner did not contain trial balances or reconciliations for each client in the sense of recording debits and credits with the resulting balance. Mr Kitching noted that some entries on the monthly statements had annotation of "?" next to them.

[13] The Tribunal has no difficulty in concluding that the practitioner has failed to complete a month end trial balance for each client matter in breach of reg 11(3)(b).

(c) and (d)

[14] The practitioner responded to failure (c) and (d) by saying that he did not understand or accept either of the allegations. He did however acknowledge that the allegations have been raised in past reviews of his trust account. He repeated his prior

[1] Section 112(1)(c) of the Act.

position that the information he receives every week from his bank is “my interest bearing (IBD) control account” and he considered this to be sufficient to meet the trust account requirements. The practitioner acknowledged that his prior position has not been accepted by the inspectorate and he now “pointlessly …” does maintain an interest bearing control account noting down interest earned against each client’s trust account. The practitioner attached a copy of a master IBD control card for the period 15 July 2016 to 30 September 2017. Mr Kitching noted that he had not previously seen this document but made the observation that it predated the 2017 review period.

[15] In evidence, Mr Lawes conceded it was not for individual practitioners to say what rules were important.

[16] The Tribunal accepts that the master IBD control card now meets the requirements of the trust account requirements but notes with disappointment that this was not provided to Mr Kitching at the time of his review.

(e)

[17] The practitioner acknowledged that he failed to provide statements to clients with ongoing trust account balances at least annually in breach of reg 12(7). He acknowledged that aged balances have been raised as an issue in the past. He said that he was working on these issues and has been “chipping away” at the old balances.

[18] The Tribunal takes a very dim view of the age of the balances in the practitioner’s trust account. It is unacceptable not to wrap up matters in a timely fashion and to retain credit balances in the practitioner’s trust account for long periods after matters had been concluded.

(f)

[19] The practitioner accepts that he did not provide the monthly and quarterly certificates in a timely fashion. The practitioner considers that the late filing of certificates falls into the category of a technical breach of the regulations and that there are no resulting substantive consequences to his trust account for his failure to file the certificates on time.

[20] The Tribunal does not endorse the practitioner's view that this is simply a technical breach of the regulations. The minimising of the requirement to file certificates shows an all over disregard of the compliance requirements for practitioners who hold trust accounts.

(g)

[21] The practitioner has acknowledged that he has an issue with credit balances that they have not been returned to clients at the conclusion of matter. This is referred to above under (e). The practitioner considers that he has generally addressed this concern by 'chipping away' at the balances.

[22] The Tribunal repeats its comments above that it is simply not acceptable to retain credit balances at the end of a transaction and all reasonable efforts should be made to ensure that those credit balances are dealt with appropriately and in a timely fashion. Mr Lawes has had a long time to deal with this issue, but has clearly not regarded it as a priority.

(h)

[23] Failure (h) relates to a controlled bank account for a client Ms F. In the trust account review, it was identified that bank statements relating to Ms F appeared to be the only accounting records kept. The account was not reconciled monthly. The bank account statements were sent to one of two sons of Ms F.

[24] The practitioner's response to this matter was that the provision of bank statements to one of Ms F's sons was sufficient to meet the trust account requirements. The practitioner however has advised that he now sends statements to both of Ms F's sons but makes the point that he regards this to be "remarkably pointless".

[25] The practitioner focused on his provision of bank statements to Ms F's son rather than the requirement for proper record keeping within the trust account where a controlled bank account is operated.

[26] The Tribunal has no difficulty in concluding that the practitioner has failed to keep proper trust account records in relation to Ms F's bank account.

(i)

[27] This issue relates to recouping firm overhead costs in clients' invoices under the heading of disbursements. Mr Kitching recommended to Mr Lawes that his practice of recouping overhead costs under the heading of disbursements in his invoices was not recommended. He suggested that he amend his invoices to make it clear that disbursements were third party costs paid on behalf of clients and that other costs should be separately identified. We agree with Mr Kitching's recommendations. We note that the practitioner provides client information where overhead costs may be passed on. We intend to make no further comment on this.

Charge 1 – Issues 1 to 3

[28] The Tribunal considered carefully the responses provided by the practitioner to the concerns. In essence, he has acknowledged that he may have failed in some respects to have complied with the requirements of the Act, the Rules and the Regulations. However the Tribunal is most concerned at the practitioner's minimising of his failure to meet such requirements. He suggests that the non-compliances in relation to providing monthly and quarterly certificates to NZLS were only late by a matter of a small number of days. Although he acknowledged there were aged balances which he was in the process of returning to clients, it was clear that he was providing little priority to dealing with aged balances even though they were the subject of prior reviews of his trust account.

[29] The practitioner's suggestion that information on his bank statements relating to the account of Ms F made the requirement redundant and unnecessary, points to the fact that the practitioner did not take seriously his requirements in administering his trust account records. The failure of the practitioner to undertake reconciliations for each client matter is a further example of this.

[30] We find that the practitioner failed to comply with the requirements of the Act, the Rules and the Regulations in that he did not keep such records as would enable his firm's trust account to be conveniently and properly reviewed. Cumulatively, we regard the breaches as demonstrating a reckless disregard of the relevant rules, and therefore reaching the standard of misconduct.

[31] Had there not been previous reviews and findings of unsatisfactory conduct in relation to the very concerns now raised again, we might have been reluctant to view the conduct as reckless, but Mr Lawes's approach, that he can determine what is important or not in respect of his trust account obligations is not one that can be countenanced.

[32] The operation of trust accounts by the profession, which is entrusted with members of the public's money, on the basis of complete integrity and self-policing, means that the highest standards must be maintained.

[33] Having made a finding at the highest level of culpability, we do not consider the two lower levels pleaded.

Background to Charge 2

[34] Mr Lawes represented Ms F, who claimed to have been in a de facto relationship with the late Mr A. On 19 May 2017 Mr Lawes received cheques which represented the sale proceeds of stock sold through Mr A's PGG Wrightson account. Before sale, the stock had been grazing on the farm owned by Mr A, and later his estate. Mr Lawes' instructions from Ms F were that she considered the stock belonged to her. However, he opened a trust account ledger in the name of the estate and paid the funds into that account. Mr Lawes says that he was not aware who might be acting for Mr A's estate and made some inquiries to ascertain this.

[35] By 26 June 2017 Ms F had become aware that Davenports, solicitors were acting for the estate and its executors N and TA.

[36] On 17 August 2017 the practitioner wrote to Davenports thanking them for "*confirmation that you are acting on the above-mentioned Estate*" and that probate had already been granted. The practitioner went on to detail a claim that his client was making under the Property (Relationships) Act 1976.

[37] He advised the other solicitor that he was holding funds "*under the name of the Estate of Mr A*" and went on to describe how those funds related to stock sold by his client. Two deposits had totalled $13,700. Mr Lawes went on to say: "*Ms F has subsequently advised me, however, that she considers these funds to be hers as, as*

indicated above, the stock was hers". He closed his letter with the sentence "*for the sake of completeness, I also advise that I have invoiced Mr A's Estate for the sum of approximately $1,000.00 for my attendances on the Estate*".

[38] On 30 August 2017 Davenports responded requesting that the funds of $13,700 be remitted to their trust account so that the executors could have control of funds as they were obliged.

[39] Further, they queried the invoicing of the estate by Mr Lawes, saying: "*We are at a loss to know how the estate could be invoiced by your firm for $1,000.00 with not having had an instruction to act*".

[40] In his affidavit, Mr Lawes said that he did not regard that statement as a request for information or querying of the fee. He said "*that, in no way, can be seen as a request for further information or a query as to the basis of my fee*". This is a somewhat surprising assertion, since it is hard to see how it could be anything else.

[41] Mr Lawes repeated in his affidavit to the Tribunal "*I do not believe that I have ever received a direct request for "any further information regarding any fee charged to the estate for [my] services*"."[2]

[42] Mr Lawes went on to state that since the funds were in dispute and the matter before the Family Court, he did not consider that the Law Society had any jurisdiction concerning the disposition of the funds and that the complaint appeared to be an attempt by the complaining lawyer who now acts for the executors to "subvert court proceedings".[3]

[43] The details of the client ledger card show that Mr Lawes rendered an invoice to the estate of $1,085.53 on 11 July 2017. That fee was deducted from the balance held in the estate's trust ledger from the proceeds of sale of the stock. There was also a deduction for fees of $2,043.72 charged to Ms F with a journal transfer reflecting movement between the two ledgers. Finally, all of the funds were transferred into the name of Ms F in March 2017, six months after the practitioner had been notified of the view of the estate solicitor that the funds ought to be remitted to them.

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[2] Affidavit of practitioner sworn 8 April 2019 at [9].
[3] Above n 2, at [17] and [18].

[44] The practitioner submitted to the Tribunal that he could have billed his client, and that there was nothing to gain by billing the estate, but thought he was acting for the estate and that she was "de facto executrix". He concedes he may well not have had insight into the situation in which this placed him.

[45] While it has not been pleaded as one of the particulars, it is clear that the practitioner, had he been indeed acting for the estate would have had a clear conflict of interest and would have been breaching r 6 by acting for both the estate and Ms F who was making a claim against it through the executors.

Charge 2 – Issue 4(a)

[46] The answer to the question posed by this issue is straightforward. Mr Lawes had no authority to charge a fee to the estate, since he had never been instructed by the executors of that estate to act on the estate's behalf.

[47] The Tribunal was most concerned with Mr Lawes' lack of clarity about who he represented.

[48] Certainly, by the time he rendered his account, which was after he had sent the email to Davenports "assuming" that they were acting, he ought not to have been confused in any way about whether he had a retainer from the estate. Clearly the attendances were on behalf of his client Ms F. At the very least he ought to have retained the funds received by him in a separate account as a stakeholder.

[49] The breach of r 6, represented by Mr Lawes' failure to recognise a potential conflict of interest between him acting for Ms F and purporting to act for the estate against which she proposed to make a claim, was not pleaded as a separate particular of this charge.

[50] However, this Tribunal is quasi inquisitorial and serves with a purpose of public protection. Therefore, to ignore such a serious matter would in our view be irresponsible.

[51] We consider it to be a seriously aggravating feature of the practitioner's conduct. It was specifically put to the practitioner in questions by the Tribunal in the course of the

hearing, but Mr Lawes still had difficulty understanding his position of conflict even at that stage.

[52] We find that on the balance of probabilities, a breach of r 10 has occurred in terms of the three particulars pleaded in the charge, in that the practitioner:

> "(a) deposited into his trust account, without authority, funds belonging to the Estate; and/or
>
> (b) failed to remit those funds to the Executors upon their request; and/or
>
> (c) charged the Estate a fee without the authority of, or any instructions from, the Executors."

[53] We consider that this constituted a reckless breach of the Rules on the practitioner's part and thus liability falls at the level of misconduct.

[54] The recklessness includes a failure to have regard to, or weigh his obligations under the Rules and further, a failure to have regard to his obligations under r 6 as to conflict of interest.

[55] The practitioner clearly failed to have regard to reg 12(6)(b) of the Trust Account Regulations 2008,[4] which reads:

> "A practice may make transfers or payments from a client's trust money only if—
>
> …
>
> (b) the practice obtains the client's instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it."

[56] We find misconduct to have been established by means of the reckless breaches set out above.

[57] The Standards Committee are to file any further submissions as to penalty within 14 days of the date of this decision.

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[4] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[58] Mr Lawes may have a further 14 days to file his submissions on penalty. Mr Lawes should set out his financial position so that the question of costs may be properly considered.

DATED at AUCKLAND this 19th day of July 2019

Judge DF Clarkson
Chairperson