NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 18

LCDT 014/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 1** Applicant
AND	**KYLEE ROSLYNNE DENISE JACOBSEN** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Mr S Hunter QC

Ms N McMahon

Ms S Stuart

Ms P Walker

DATE OF HEARING 7 May 2021

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 25 May 2021

COUNSEL

Mr P Collins for the Standards Committee

Mr T Cooley for the respondent

DECISION OF THE TRIBUNAL RE LIABILITY

Introduction

[1] Ms Jacobsen acted for her mother in a conveyancing transaction where she had a conflict of interest. She has admitted two charges of misconduct. The first relates to acting in circumstances of conflict; the second, to failing to act competently to protect her mother's interests (as her client). This hearing is to determine whether she is liable on a third charge and, if so, whether misconduct or unsatisfactory conduct occurred.

[2] The third charge against Ms Jacobsen is that she engaged in conduct that was misleading or deceptive, or was likely to mislead or deceive, her mother. The Standards Committee argues that her conduct breached Rule 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). The Standards Committee particularly notes her written promises to do two things: she promised to prepare a document to record the arrangement with her mother; and she promised to register a caveat to protect her mother's interest in the property. During Mr Collins' opening submissions, we clarified that the charge was based upon the totality of Ms Jacobsen's conduct around the time of the conveyancing, not limited narrowly to either or both of those promises.

[3] Mr Cooley submits that the Standards Committee has not proved necessary elements of the charge. He argues that the promises were not dishonestly made, nor misleading or deceptive. He argues that in the absence of evidence by Ms Jacobsen's mother, Ms Jacobsen's evidence on material matters is not refuted. He argues that this matter is an offshoot of Charge 2 (already admitted) or that it amounts to no more than unintentional negligence, short of misconduct.

[4] The issues we must decide are:

- What was the transaction?

- Was Ms Jacobsen's conduct misleading or deceptive, or likely to mislead or deceive, her mother as to the security of her resultant position?

- Is it misconduct? And, if so, is it misconduct falling within Charge 2?

- If it is not misconduct, is it unsatisfactory conduct?

What was the transaction?

[5] Since 2012, Ms Jacobsen's mother and aunt owned a bach property at Mt Maunganui in shares, respectively, of 4:1. They had bought it from their mother's estate. Ms Jacobsen acted for her mother and aunt on that purchase. It had been a family bach where Ms Jacobsen and her mother had shared many treasured holidays.

[6] In 2016, Ms Jacobsen's aunt advised that she wanted to cash up her interest in the bach. Ms Jacobsen's mother could not afford to pay her sister out but did not want the bach to be sold. Her three sons (all older than Ms Jacobsen) were unable to assist her predicament.

[7] Ms Jacobsen's mother was a retired schoolteacher (mathematics) living in her own home in Putaruru. Her interest in the property was her major financial asset. She had formerly owned a property at Kinloch which she had transferred, through two successive transactions, to her son Brendon, an accountant. Ms Jacobsen's employers at the time acted in those transactions. Ms Jacobsen's mother had, a few years earlier, borrowed $50,000 on the security of an old bank mortgage registered against her home and provided it to Ms Jacobsen who was then having financial difficulties.

[8] Ms Jacobsen was living with her husband and young son at Otorohanga. She had recently commenced sole practice in Te Awamutu. Her relationship with her mother was close and cordial.

[9] Ms Jacobsen and her husband were directors and equal shareholders in Vantage Acquisitions Limited (VAL). Ms Jacobsen proposed that VAL would buy the property from both sisters; Ms Jacobsen's aunt would be paid for her one-fifth share

and VAL would hold the remaining four-fifths on trust for Ms Jacobsen's mother. As noted earlier, Ms Jacobsen promised on 20 June 2016, days before settlement, to prepare a document to record the transaction and the registration of a caveat to protect her mother's interest.

[10] The parties obtained indications of value and settled on $625,000 as a fair value for the property in 2016. VAL borrowed $198,000 from ANZ Bank, which was secured by a mortgage against the property. $125,000 of this borrowing was paid to Ms Jacobsen's aunt for her share. The agreement for sale and purchase recorded that Ms Jacobsen's mother was selling her interest for $73,000. A mortgage owed by her mother was repaid for a little under $71,000. The balance of a little over $2,000 was paid to Ms Jacobsen's mother.

[11] Immediately after settlement on 24 June 2016, VAL owned the property. Ms Jacobsen's mother had $2,000 but no longer had any legal interest in the property. No document recorded Ms Jacobsen's mother's beneficial interest in the property. No caveat was prepared or registered. No deed of trust was prepared. VAL mortgaged the property to borrow the $198,000 referred to above. At the same time Ms Jacobsen and her husband refinanced the loan over their own home. The total lending was secured over both properties; the mortgage over the Mt Maunganui property had a priority sum in favour of ANZ of $1 million.

[12] In December 2017, Ms Jacobsen's mother instructed solicitors to act for her.

[13] Despite her mother having instructed her own lawyers, VAL refinanced with BNZ in April 2018, securing $1.2 million over the property. Ms Jacobsen's mother was not informed of the refinancing transaction. Ms Jacobsen says that she needed finance to purchase another legal practice in Tauranga to better ensure her ability to earn money and thereby protect her mother's interests in the property.

[14] Each of the parties had separate representation in the eventual settlement negotiations. Disputed areas included why Ms Jacobsen's mother no longer held an interest in the property and why Ms Jacobsen alleged her mother's share was only 68 per cent rather than 80 per cent. Fortunately, the property had risen in value. There is no suggestion in the present case that Ms Jacobsen's mother suffered financial loss. Instead, her legal position was exposed for the period from settlement

until her independent lawyer took steps to redress the matter. They settled, recording their terms in a Deed of Settlement dated 29 March 2019. The property was sold and, subject to adjustment for the earlier repayment of Ms Jacobsen's mother's mortgage, Ms Jacobsen's mother and VAL divided the net proceeds in the proportions of 80:20.

[15] Although the Deed of Settlement contained a confidentiality clause, one of Ms Jacobsen's brothers complained to the Law Society. Ms Jacobsen's mother filed a supporting email to the effect that although she was prevented from complaining because of the confidentiality clause, she supported her son's action. She added "While I hate to pursue this procedure against my daughter, I do want to ensure that similar practices never happen again."[1]

Was Ms Jacobsen's conduct misleading or deceptive, or likely to mislead or deceive, her mother as to the security of her resultant position?

[16] The terms of Rule 11.1 are identical to the test in s 9 of the Fair Trading Act 1986. Counsel agree that the first stage of the test is fixed by reference to the Supreme Court decision in *Red Eagle Corp Ltd v Ellis*[2]:

> The question to be answered is "whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9.

[17] Mr Collins established in cross-examination that when, on 20 June 2016, Ms Jacobsen emailed her mother that "I am still preparing the document recording the arrangement between you and Jeremy and I; although, this does not need to be completed prior to settlement on Friday", she had not actually begun physical preparation of such a document. We are willing to read this statement as a loose promise of intent to do so shortly rather than taking a narrow reading. Nonetheless, there was virtually no positive action in this regard. Ms Jacobsen gave evidence of looking on the internet for suitable clauses.

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[1] Exhibit B to affidavit Nathan Hunt 021 of Charge Bundle.
[2] *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20.

[18] Ms Jacobsen's mother was upset about the risk of losing the property to enable her sister to withdraw from ownership. She complained to her daughter that she was not sleeping. We find she was susceptible to an apparent rescue package. We find that her aim was to retain her interest in the property. Although there were slight references to the position of VAL, we find that she would have been unlikely to appreciate the material differences between her owning a share in the real estate and VAL owing it, even if some or all of the shares in VAL were held on trust to secure a position for her. Among the difficulties in this situation is the fact that there was no document establishing the relative positions of the parties, let alone the precise obligations of Ms Jacobsen, her husband or VAL to Ms Jacobsen's mother.

[19] The failure to appreciate consequences may have been shared by Ms Jacobsen herself. As Tribunal member McMahon pointed out to Ms Jacobsen, once the real estate was owned by VAL, there was no possibility of a caveatable interest to protect Ms Jacobsen's mother who had, at best, only a beneficial interest in the shareholding of the company. After that exchange, Ms Jacobsen's evidence adjusted for that feature and she suggested that the reference to a caveat were loose words, not necessarily meaning a caveat over land, but that her mother was aware of the difference and was content with the removed interest. We were not convinced of that proposition. The tenor of the language in the limited written records available tends strongly in favour of the proposition that Ms Jacobsen's mother thought the transaction would preserve her interest in the property (meaning the real estate). We do not accept that she would have appreciated the consequences such as the ability for Ms Jacobsen and her husband to refinance without reference to her, as they did in April 2018.

[20] We find Ms Jacobsen's conduct in assuring her mother that her interest in the property would be protected was conduct that was likely to mislead or deceive her mother. If her mother had the degree of sophistication in business matters that Ms Jacobsen contends, she would have inferred from the promise of a caveat that she would at least have a caveatable interest in the land. We find Ms Jacobsen's mother's subsequent conduct in challenging the entire transaction as conduct supportive of her having been misled or deceived. Even the extent of her notional interest, whether 80 per cent or 68 per cent, proved to be a significant misunderstanding between the parties which supports the view that she was misled or deceived. Had the precise terms of the proposition been clarified, documented,

and ratified by all, well before settlement, Ms Jacobsen's mother's notional share in the property would have been settled.

[21] In re-examination, Mr Cooley reminded us about the tendrils of evidence that, read in isolation and in a favourable light for Ms Jacobsen, might cast doubt on this matter. Looking at the evidence overall and taking as charitable a view of Ms Jacobsen's mother's ability to appreciate the niceties of this transaction, we are firmly of the view that she expected to retain an interest in the land. We find that she would not have entered into this transaction had she not been misled or deceived by Ms Jacobsen's conduct.

[22] Once misleading or deceptive conduct is found, the inference of causality is readily made. We find that the misleading conduct was an operating cause of Ms Jacobsen's mother's plight.

Is it misconduct? And, if so, is it misconduct falling within Charge 2?

[23] In this case, the charge of misconduct (for Charge 3) is of greater gravity than the alternative charge of unsatisfactory conduct. Accordingly, we must consider misconduct first[3] and only move to consider unsatisfactory conduct if misconduct is not proved.

[24] One of the tests for misconduct is[4]:

> "(a) … conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
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> …
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
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> …"

[25] In this case the Standards Committee relies upon a breach of Rule 11.1 of the Rules. The relevant head Rule (Rule 11) provides that "A lawyer's practice must be

[3] *J v Auckland Standards Committee 1* [2019] NZCA 614 at paras [37] and [38].
[4] Section 7(1)(a), Lawyers and Conveyancers Act 2006.

administered in a manner that ensures that the duties to … clients are adhered to, and that the reputation of the legal profession is preserved." It is within that context that Rule 11.1 provides "A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice."

[26] It can be noted that Rule 11.1 bears a relationship to Rule 11 which requires adherence to duties to clients and preservation of the reputation of the legal profession. In misconduct cases, breaches of duties reflect on the legal profession generally and reflect on fitness to practise. Unsatisfactory conduct will not bring up the question about fitness to practise.

[27] Considering the term "misconduct," Webb et al observe:[5]

> [I]t is clear that misconduct is a very serious professional wrongdoing. This is, of course, confirmed by the contradistinction with unsatisfactory conduct, which (at the higher end) can itself be serious, but clearly not of a degree to reflect on fitness to practise.

[28] Lawyers hold a privileged position. Integrity and trustworthiness are prerequisites to admission because, without these qualities, the public may lack confidence in the profession as a whole.[6] A candidate in Australia was refused admission because of a lack of "appropriate professional judgement and discretion."[7] In New Zealand, in a case regarding a valuer, "Eichelbaum CJ reviewed the concept of professional misconduct generally and noted that across all professions the key element is whether the practitioner's conduct has shown some degree of unfitness to practise."[8]

[29] In the Australian case of *Pillai v Messiter*,[9] Kirby J observed[10]:

> … but the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.

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[5] *Ethics, Professional Responsibility and the Lawyer,* Webb, Dalziell and Cook, LexisNexis, at p 107.
[6] *Lawyers' Professional Responsibility (5th ed.)*: G E Dal Pont. Thomson Reuters, at p 37.
[7] *Re Hampton* [2002] QCA 129; See Dal Pont (above), p 46.
[8] *Ethics, Professional Responsibility and the Lawyer,* Webb, Dalziell and Cook, LexisNexis, at p 108 - 109, referring to *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, 724 – 725.
[9] *Pillai v Messiter* (1989) 16 NSWLR 197.
[10] *Pillai v Messiter* (1989) 16 NSWLR 197, 200.

[30] Kirby J's dicta was adopted by the New Zealand Court of Appeal in *Complaints Committee No 1 of the Auckland District Law Society v C* where it was held that intentionality is not a necessary ingredient of misconduct. The Court stated:

> While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner.[11]

[31] The test in s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 for misconduct depends on a contravention of the rules. The contravention must be wilful or reckless. The term "wilful" denotes, among other meanings: "determined to take one's own way; obstinately self-willed or perverse; done on purpose or wittingly; purposed, deliberate, intentional; not accidental or casual."[12] "Reckless" denotes, among other meanings, "careless, heedless; careless in respect of one's actions; lacking in prudence or caution; careless in respect of some duty or task, negligent, inattentive; characterised or distinguished by (negligent carelessness or) heedless rashness."[13] Either adjective, "wilful" or "reckless," intensifies the rule contravention required to bring the conduct up to "misconduct".

[32] In the present case, we find that Ms Jacobsen's conduct led her mother to believe her 80 per cent interest in the property, that is, the real estate, was going to be preserved and protected. She was assured she would be protected by a caveat. That was not a possible option given that VAL was to be registered as the owner. Whether Ms Jacobsen appreciated this or not, her assurance misled or deceived her mother so that she was induced to sign the agreement that recorded she was selling her interest in the property for $73,000.

[33] We find Ms Jacobsen's assurance to her mother that a document would record the transaction similarly misled her. We make that finding because the general assurance was itself an inducement to her mother to approve the transfer even though her own interest was legally unprotected, and no document was prepared to record the transaction.

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[11] *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.
[12] OED (2nd).
[13] OED (2nd).

[34] We agree with Mr Collins that Ms Jacobsen's misleading representations comprise a form of recklessness that can be described as "wilful blindness."[14] Whether intentional or not, Ms Jacobsen's conduct in describing the transaction and the way her mother's interest would be protected, amounts to recklessness. We find a breach of Rule 11.1 and accordingly find that the s 7(1)(a)(ii) test is satisfied. Accordingly, we find this default amounts to misconduct.

[35] In this case, there is some inevitable overlap between aspects of the three charges. The professional blindness that prevailed once Ms Jacobsen embarked upon acting for her mother in this conflicted transaction contributed to her failure to properly protect her mother's interests. Her mother's interests were not protected as any client was entitled to expect. Instead, she was left legally exposed and any action to protect her was relegated down in priority below any other work. Equally, Ms Jacobsen may not have appreciated how her rescuing package and her offer to do the work without fees would induce her mother into a relationship that offered no professional protection for her as a client.

[36] We would not want to add to the number of charges if the substance of Charge 3 is essentially a circumstance of Charge 2, failing to protect her mother's interests. We are satisfied this is a proper stand-alone charge. The conduct whereby her mother was induced to enter into the transaction is not merely an adjunct of Charge 2. It is a product of Charge 1. Charge 3 deals with the conduct that placed Ms Jacobsen's mother in the position where Charge 2 operates. We do not find Charge 3 as an unnecessary duplication of charges.

[37] We find Charge 3 proved as misconduct.

If it is not misconduct, is it unsatisfactory conduct?

[38] Because we have unanimously, firmly found misconduct, we see no need in discussing the lesser alternative charge.

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[14] *Hong v Auckland Standards Committee* 5 [2020] NZHC 1599 at para [59].

Directions

[39] At the conclusion of the hearing, we made the following directions.

1. Mr Collins shall file his penalty submissions (now, necessarily, on 3 charges) by 18 June 2021.

2. Mr Cooley shall file his penalty submissions by 16 July.

3. The penalty hearing shall be set down for half a day not before 26 July at a date suitable to counsel and the Tribunal members.

DATED at AUCKLAND this 25th day of May 2021

Judge JG Adams
Deputy Chairperson