NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 23
LCDT 019/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE 1** Applicant
AND	**ROYAL REED** Respondent

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms K King
Ms M Noble
Ms M Scholtens QC
Prof D Scott

HEARING 6 & 7 May 2021

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 27 July 2021

COUNSEL
Mr G Burston and Ms K Kensington for the Standards Committee
Ms R Reed QC and Ms S Cameron for the Respondent Practitioner

DECISION OF THE TRIBUNAL

Introduction

[1] This case concerns the level of liability which is to be found following the admitted failure to disclose a number of relevant pieces of information to the High Court in a without notice application for a freezing order.

[2] The practitioner has taken responsibility, as the supervising partner concerned, counsel on the record and the leader in the litigation. It was she who took instructions directly from the client and supervised the lawyer who drafted the documents. The practitioner now accepts her conduct is at "the higher end" of "unsatisfactory conduct".[1]

[3] The Standards Committee seeks a finding of misconduct as an intentional or reckless breach of the Rules[2]. Or it says, at the very least, the conduct should be regarded as such serious negligence as to bring the profession into disrepute[3].

Issues

[4] We adopt as accurate the issues set out in the closing submissions of the Standards Committee as follows:[4]

A. Did the application for the freezing order fail to comply with the duty of full disclosure?

B. What pieces of information should have been included but were not?

C. What did the practitioner know?

D. Did the practitioner's conduct, in those circumstances, constitute a wilful or reckless contravention of the Rules?

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[1] Unsatisfactory conduct is defined in s 12 of the Lawyers and Conveyancers Act 2006 (LCA).
[2] Section 7(1)(ii) LCA.
[3] Section 241(c) LCA.
[4] Closing Submissions Standards Committee at para [40].

E. If not, was the practitioner's conduct negligent to such a degree as to (tend to) bring the profession into disrepute?

F. If not, is the practitioner's admitted unsatisfactory conduct a proper level of culpability in these circumstances?

Background

[5] The practitioner and her firm acted for a wife in relationship property proceedings. Prior to substantive proceedings being filed in the Family Court, Ms Reed filed, on 16 March 2017, on a without notice basis, an application seeking a "freezing" order under s 43 and s 44 of the Property (Relationships) Act 1976 (PRA) ie an order to restrain the disposition of the proceeds of sale of an apartment in Hobson Street and money in some bank accounts.

[6] Shortly after, on 20 March 2017, His Honour Judge Druce declined to make the order sought but adjourned the proceedings for 14 days to enable the wife to file further evidence. The Judge said that he was not satisfied that a clear case was made out that the wife would suffer irreparable injury should the matter be placed on notice, because, among other things, the evidence indicated the apartment had not been occupied as the family home at the date of separation. For this reason, His Honour opined that the apartment "had probably reverted to being (the husband's) separate property (as he had acquired it in 2006 prior to the marriage in 2011)".

[7] Rather than filing further evidence, the practitioner decided that the Family Court Judge was wrong. She also said in her evidence that her instructions were somewhat intermittent. In her earlier affidavit to the Tribunal Ms Reed said that following the ruling she asked Ms M, who was also acting on the file, under the Practitioner's supervision, to obtain some further evidence from their client. In early May they filed a substantive (on notice) application for the usual orders for division of property on the breakup of a relationship under the PRA.

[8] However, in July Ms Reed decided that she ought to make a without notice application for a freezing order in the High Court because, she said, she thought it was

likely that the funds had already been transferred to the husband's parents by that time and that they would need to be defendants to the application.[5]

[9] The practitioner instructed the competent but not very senior solicitor, Ms M, to prepare a without notice application for freezing orders and then she reviewed the application and affidavit before filing them. The application itself was signed by Ms M, the practitioner thinks this was likely because of her own unavailability at the time, but in any event she has taken responsibility for the certification that must be entered on any without notice application that all relevant matters have been disclosed to the Court.

[10] The without notice application to the High Court did not state that an application to restrain disposition had already been made in the Family Court and refused on the basis of the evidence then before it. No memorandum of counsel was filed with the application.

[11] The application sought to restrain the disposition of the proceeds of the sale of an apartment in Hobson Street, which had been sold in August 2016. The funds had been deposited in the husband's parents account. The apartment was said to have been the family home of the couple. The application for the freezing order also referred to another property, the Blockhouse Bay Road property.

[12] In relation to this latter property (which was where the parties were actually living at the time of their separation) the wife deposed that her father had "invited the family to move into that property on a temporary basis rent free". Neither the application or the supporting affidavit by the wife disclosed that:

(i) The Blockhouse Bay Road property arose out of a redevelopment undertaken by the husband and the wife and had been purchased for the purpose of subdivision. Although two-thirds of the purchase price came from a bank loan the rest had been funded by the wife or her parents, but the husband and wife were jointly

[5] The practitioner could have applied to have them joined in the Family Court proceedings, but this was not put to her in evidence.

registered as the proprietors of the property and were joint mortgagees to the bank.

(ii) Two of the three lots subdivided had been sold and the third retained and the house constructed. That was the property in which the couple and their child and the husband's parents moved in to in July 2015.

(iii) Nor was it disclosed that the husband had made substantial financial contributions to the redevelopment of the property (this was disputed).

(iv) The husband had made a claim in respect of the property (of which he was a joint registered owner) and in November 2016 the parties had entered into a written agreement in relation to that property which provided for the payment from the sale proceeds, some into the husband and wife's joint bank account and the rest to the wife's account.

[13] In reliance on the (defective) information with which it was supplied, the High Court made an order freezing the sale proceeds as sought.

[14] The husband and his parents applied to discharge this order which by the time the application was argued, then had been in place nine months. In granting the husband's application, Muir J referred to two key details having been omitted from the without notice application, firstly the background to the ownership and occupation of the Blockhouse Bay Road property and secondly, the potential defence of the Hobson Street apartment reverting to separate property.

[15] His Honour held that, had the Court been made aware of those facts, then "unequivocally" the freezing order application would not have been granted.

[16] Just referring to those two omissions, Muir J found that the wife's affidavit did not meet the requirement to make a full and fair disclosure of all the material facts. His Honour found that had the Blockhouse Bay Road property been referred to, it would

have been apparent that any shortfall by loss of the sale proceeds of the Hobson Street apartment could easily be met by the husband's interest in Blockhouse Bay Road.

[17] Although costs, with an uplift, were awarded against the practitioner's client, Muir J did not order indemnity costs because he regarded the lack of disclosure to be as the result of an "oversight" by counsel. Had His Honour been aware of the third and very significant omission in the application for a freezing order, it is debatable whether His Honour would have approached the matter on such generous basis. His Honour was not aware of the failure of the practitioner to refer to the s 43 application in the Family Court in March 2017, and that it had been declined by His Honour Judge Druce on the basis of the possible defence of reversion to separate property of the Hobson Street proceeds.

[18] In her affidavit to the Family Court, the wife had deposed that her husband had "started arguing that the Blockhouse Bay property was his" at the time of the relationship breakdown. This information was excluded from the High Court material, as was any reference to the actual ownership of the Blockhouse Bay Road property, or the agreement which the parties had signed as to its division. Notwithstanding the wife's later repudiation of the November 2016 agreement relating to the property, she still had an obligation to refer to it as part of the material background.

[19] In her evidence concerning the omission of the reference to the Family Court proceedings during the preparation of the High Court application, the practitioner told us that this was simply an oversight on her part and that she assumed that those proceedings would have been attached to the affidavit of her client when it was filed.

[20] Throughout these disciplinary proceedings the practitioner has maintained that she has been disadvantaged by the refusal of her client to waive privilege in relation to the details of the Family Court proceedings. These proceedings were ongoing at the time of this disciplinary hearing.

[21] In order to release her from her obligations of confidentiality, the Tribunal made orders in the course of the hearing, directing that the relevant portions of the Family Court proceedings be made available. These documents comprised approximately 40 pages, thus bulky and, one would surmise, somewhat difficult to overlook.

[22] A further relevant matter is that when the without notice application was first made to the High Court, counsel overlooked the filing of an accompanying memorandum. This was prepared and filed one day later. The practitioner assured us that this was a highly unusual event because her practice in this regard was to be very careful.[6] This later filing of the memorandum ought to have provided both the practitioner and Ms M with the opportunity of reviewing the available documentation and ensuring that it was in order before filing the memorandum.

[23] Significantly, earlier in the proceedings the practitioner gave a different explanation for the non-filing and non-reference to the s 43 Family Court application and we shall return to this later.

[24] Although the High Court did not refer the breach of the non-disclosure requirements directly to the Law Society, another practitioner drew Muir J's decision to the attention of the Complaints Service and an own motion investigation began, which has led to the current charge.

[25] We turn then to consider the issues:

Issue A. Non-Compliance with Duty of Full Disclosure

[26] It is accepted by the practitioner that the application for which she has taken responsibility failed to comply with the obligation on counsel to make full and frank disclosure of all material matters. Rule 32.2 of the High Court Rules 2016, subsection (3) states:

> (3) An applicant for a freezing order without notice to a respondent must fully and frankly disclose to the court all material facts, including—
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> (a) any possible defences known to the applicant; and
>
> (b) information casting doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages.

In addition to this statutory provision, the Standards Committee relies on Rules 2.1 and 13.1 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, which are:

[6] As an aside the practitioner also pointed out that she had never had any other without notice application set aside in this manner.

Chapter 2
Rule of law and administration of justice

…

2.1 The overriding duty of a lawyer is as an officer of the court.

…

Chapter 13
Lawyers as officers of court

…

Duty of fidelity to court

13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

…

[27] These are fundamental obligations of every lawyer, well known to the practitioner.

Issue B. What Information Should Have Been Included and Was Not

[28] We consider the following material ought to have been disclosed:

(a) The fact of the analogous without notice application under s 43 of the PRA in the Family Court in March 2017; the reasons that were given for declining it at that point; and the fact that an opportunity was given to file further evidence which was not taken up. The practitioner accepts that the fact of the s 43 application ought to have been included. Her reasons for excluding this have changed over time. Her most recent evidence that she thought that the proceedings had been attached but was mistaken, became somewhat undermined when we observed how bulky (40 plus pages) the attachment would have been. Furthermore, the rare occasion of having overlooked filing a memorandum with the High Court proceedings, and the requirement to file it late, would have provided further opportunity for such an oversight to have been picked up.

But perhaps more importantly, this explanation differs markedly from that which she gave through her previous counsel in her lengthy submissions to the Standards Committee. Those submissions canvassed the "good reasons" not to have referred to the application, because it was said to have

been "spent". Instead, the later May 2017 s 44 substantive application was referred to. These different explanations are of concern to us. The Standards Committee submit that we ought to infer from them a deliberate decision to forum shop by filing the second application for a freezing order in the High Court.

(b) The omission of the existence of a claim by the husband in the Blockhouse Bay Road property. The lack of reference to the Blockhouse Bay Road property at all, given it is registered in the joint names of the disputant couple, is inexplicable. The description of the property in the client's affidavit as her father's house was sufficiently misleading as to justify by itself setting aside the freezing order according to Muir J. At the time the freezing order application was filed the practitioner knew:

(i) The husband had been claiming that the Blockhouse Bay Road property was his.

(ii) That it was registered in joint names of the couple.

(iii) That after they had separated they had both signed an agreement proposing division of the proceeds of sale.

As pointed out by counsel for the Standards Committee the fact that this property might later be held not to be relationship property is irrelevant. For the purposes of the obligations under a without notice application its existence and potential to be relationship property had to be disclosed. Muir J was "particularly exercised" by this failure.

(c) The existence of the potential defence for the husband, that the Hobson Street property had reverted to his separate property. Whether the practitioner disagreed with the analysis of a reversion claim, the fact is that its potential had been specifically drawn to her attention by a Family Court Judge only in March of that year[7]. So not to refer to it is unfathomable.

[7] Whose view was repeated by Muir J, although he did not know of the Family Court's earlier ruling.

Issue C. The Practitioner's Knowledge

[29] We have referred to this, for each omission, under Issue B.

Issue D. Was this a Wilful or Reckless Contravention?

[30] In combination, the errors are in our view sufficiently serious to find a reckless breach of the duty of utmost candour[8].

[31] Having heard directly from the practitioner, we are not prepared to go the step further and infer deliberate omissions on her part. What is hard to avoid as a conclusion, is deliberate forum shopping.

[32] For those reasons we find that the conduct proved to the level of misconduct as a reckless breach. The decision not to go back to the Family Court with further evidence (even if the time had elapsed she could have sought leave to file evidence out of time), but to try a different forum in the High Court is of significant concern.

[33] We accept the submission of Mr Burston that:

> "… the duty of candour that attaches to a without notice freezing order application is an active duty. These were documents that the practitioner needed to ensure complied with the duty of candour, and they did not."

[34] The Standards Committee submits that the failures involved take the conduct to the level referred to in the *C* case[9] in which the High Court found:

> "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."

[35] We note the practitioner's evidence that she was under considerable work-related pressure at the time. She was carrying a significant workload and said this was a disorganised file. We recognise that this practitioner has taken responsible steps,

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[8] See para [26] above for rules relied on.
[9] *Complaints Committee No. 1 of Auckland District Law Society v C* [2008] 3 NZLR 105.

not only in the re-organisation of her own practice in order to ensure that this never reoccurs, and that she has accepted responsibility for failures in supervision in this matter, which is to her credit. However, these are matters which are more relevant to the question of penalty than with the assessment of level of culpability. This is a promising and impressive practitioner, however she has made such serious errors that they cannot be minimised to recognise what she has later done to prevent reoccurrence. We recognise that a professional under significant pressure may not be a safe practitioner.

Issue E

[36] Since we have found the conduct to have reached the level of misconduct, we are not required to consider lesser alternatives to the charge.[10]

[37] However, for the sake of completeness we have no difficulty in finding that if we are wrong that this particular conduct has not reached the level of misconduct, the number of errors and omissions in this case would most certainly reach the standard of negligence such as to tend to bring the profession into disrepute.

[38] Given the complete reliance placed by Courts on the accuracy of information provided by counsel on without notice applications, we consider a reasonable member of the public would be dismayed to know how far this application fell short of that standard.

Issue F

[39] The practitioner has acknowledged conduct to be at least at the level of the high end of unsatisfactory conduct, so if we are wrong in the preceding two findings, this level would stand.

Additional Comments

[40] We are troubled by the absence of evidence from Ms M. The practitioner says she did not want to make things difficult for her employee. Frankly, we do not consider that asking an Officer of the Court to come before her disciplinary body and tell the truth is a great imposition.

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[10] *J v Auckland Standards Committee 1* [2019] NZCA 614.

[41] This is not a forum where respondents can hide behind the burden of proof. It is not a civil or criminal matter but a quasi-inquisitorial forum where the lawyer is obliged to provide as much information as available to assist the Tribunal to make determinations. Thus, the submission of Ms Reed QC on her client's behalf that it was only the obligation of the Standards Committee to produce the employee to clarify unclear matters, is rejected by us.

[42] Having said that, we do not consider that we could take the inference of a deliberate decision to omit documents without having heard evidence from Ms M.

[43] Furthermore, the practitioner strongly relied on her being disadvantaged by reasons of her obligations of privilege. We did not find the material provided during the proceedings to support that view. To the contrary, the sheer bulk of the original without notice application to the Family Court made her failure to notice its absence in the later without notice application to the High Court for the same orders even more surprising.

Directions

1. Counsel for the Standards Committee are to file submissions as to penalty within 14 days of the date of this decision.

2. Counsel for the practitioner to file submissions 14 days thereafter.

3. A penalty hearing has already been allocated for 2 September 2021.

4. Submissions will need to include the issue of name suppression which is granted on an interim basis only at present.

DATED at AUCKLAND this 27th day of July 2021

Judge DF Clarkson
Chairperson