NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 7

LCDT 012/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**GRAEME WILLIAM HALSE** Practitioner

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Mr S Hunter QC

Ms M Noble

Mr K Raureti

Mr B Stanaway

DATE OF HEARING 16 March 2021

HELD AT District Court, Auckland

DATE OF DECISION 19 March 2021

COUNSEL

Mr P Collins for the Auckland Standards Committee

Mr A Gilchrist for the Practitioner

DECISION OF THE TRIBUNAL RE PENALTY

Introduction

[1] The charges in this matter relate to Mr Halse's role on both sides of a series of lending transactions. Mr Halse facilitated the loan of his clients' funds to another client and that client's business entities. Further, Mr Halse contributed his own funds to the loans. The complaint was made by Mr Halse's borrower-client.

[2] Charge One concerned an alleged conflict between Mr Halse's own interests and those of the complainant in breach of Rule 5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Charge Two concerned Mr Halse's role for multiple clients, allegedly in breach of Rule 6.1 of the Rules.

[3] In respect of both charges, the Standards Committee originally alleged that Mr Halse persuaded the complainant to continue with the relevant borrowing after the complainant himself expressed a wish to source his funding from first tier banks. The complainant alleged that bank funding was available and that only Mr Halse's interventions dissuaded him from taking it.

[4] Mr Halse's alleged actions in respect of the potential bank lending were a significant focus of the Standards Committee's case. It was these (alleged) actions that were said to lift the matter into the category of misconduct.

[5] Shortly before the hearing, affidavit evidence from an unaligned professional who had knowledge of material events effectively refuted that the practitioner had promoted the interests of client-sourced lenders above the interests of the complainant client. This led the Standards Committee to withdraw its allegations of misconduct and allege only unsatisfactory conduct in respect of both charges. This was appropriate. We approve the consequent reduction in gravity of the charges.

[6] Thus, at the outset of the hearing, the practitioner faced two charges of unsatisfactory conduct. The first related to conflicting interests (Rule 5); the other to acting for more than one party (Rule 6). Having read the evidence-in-chief and submissions filed by both parties, our provisional view was that the second charge (Rule 6) seemed insubstantial. Although Mr Halse acted on both sides of the loan transactions, he obtained informed consent – many times over the years – as required by Rule 6.1.1. Overall, on the papers, we had little concern about the practitioner's having acted for multiple parties in the transaction. However, despite an expert opinion suggesting that the practitioner's actions in the first charge might be negligible, we regarded his failure to alert the complainant (and the complainant's business entities) that he was personally a contributor to the loans, even for the small initial sum of $15,000, as a failure that could be proven or established.

[7] In this context, we disclosed our tentative views to counsel who took the opportunity of an adjournment to discuss the matter. In the event, the Standards Committee withdrew the second charge. Having received a penalty indication, Mr Halse admitted unsatisfactory conduct in respect of Charge One pursuant to ss 12(a), (b) or (c) of the Lawyers and Conveyancers Act 2006 (the Act). This decision discusses the circumstances to provide context for the penalty.

What was the practitioner's default?

[8] Mr Halse had acted for his complainant client for many years. The client was a property developer. Their relationship was cordial, each attended social functions hosted by the other. Mr Halse was a trustee of two trusts associated with the client, one of which owned the client's home.

[9] At the relevant period of time, the client had the opportunity to build a number of dwellings. The land was to be provided by an entity ("the provider") who required certain assurances. The client needed finance. His primary hope was to obtain financing from a bank, preferably finance that would not require a mortgage over his home (owned by a trust). The proposed arrangement required all three parties – client, provider and bank – to bind themselves to terms. That proved difficult. For example, a significant threshold concerned pre-sales. Although pre-sales gave

confidence to the provider and the bank, they eroded the client's potential profit (provided the market continued to rise).

[10] A finance broker was engaged. Negotiations were undertaken with at least two major banks. The broker's work extended from March 2013 to March 2015. The finance broker is the deponent described earlier in this decision as an unaligned professional. He described the transaction as "complicated". He found the provider "not easy to deal with." Although the transactions sought with the banks did not involve a mortgage over the trust property, it eventually proved impossible to reach a tripartite deal. Accordingly, there was ultimately no realistic prospect of funding from either bank. Mr Halse actively supported the broker's efforts throughout.

[11] The broker suggested another (non-bank) lender but Mr Halse had five clients who would contribute to a partnership as a vehicle to lend the funds. That partnership did require security over the home (trust). By this time, the client needed funds promptly in order not to lose the deal with the provider.

[12] The partnership funds were $15,000 short of what the client needed so Mr Halse contributed that shortfall from his own funds. There is no record establishing that the client or the client's business interests were specifically informed about his personal contribution, nor that they were specifically advised to seek independent advice as a consequence of the practitioner's own funds having been introduced.

[13] Later, Mr Halse's $15,000 was repaid. On two later occasions, Mr Halse substituted his own funds to enable funds of another contributor to be released. One occasion involved $10,000, the other involved $75,000. Thus, Mr Halse contributed a maximum of $85,000 at any one time, approximately 20 per cent of the particular debt.

[14] After the loan had been advanced, the client's business was placed in receivership. However, at the time of signing the loan documents, the client completed documentation to confirm the business was solvent. We do not find that Mr Halse had reason to doubt the security of the loan when it was advanced. We

note that Mr Halse's final contribution of $75,000, to enable a contributor to withdraw funds, occurred after the receivership began.

[15] The client executed documentation (as he had done many times before) confirming that he had been advised to obtain independent legal advice and waived it in relation to the loan transaction.

[16] Although the client later complained that Mr Halse had promoted his client-sourced lenders over a bank, and that he had not wanted to give security over his house, we find these are not balanced criticisms. There was no viable option for funding from a bank. The client's home (trust) had provided security for many loans in the past. Desirable as it may have been for the client to clear the house, it was not viable from a lender's position. The need for that security seems to have been borne out in the subsequent commercial difficulties faced by the client's business.

[17] On one version of these facts, Mr Halse can be seen to have promoted the common interests of both sets of clients. He had a cluster of clients willing to lend money. He had a developer client looking for a convenient source of funding, squeezed for time. When the funds were $15,000 short, he contributed his own funds. Later, when he substituted some funds of his own to enable a contributor to withdraw funds, the structure of the loan was not materially altered. What, then, did he do wrong? We consider the rules and the reasons for those rules.

[18] It is important that a lawyer be able to discharge her or his professional obligations to every client without impediment. Public confidence can be undermined if lawyers place themselves in conflicted situations. Avoidance of conflicts is the concern of Rule 5. Rules 5 to 5.4.5 are annexed to this decision as Appendix 1.

[19] Mr Halse infringed Rule 5.4.1 because he failed to advise his client of his own interest flowing from his own contribution of funds to the loan. Benign as his contributions may have seemed, his failure to disclose and record that disclosure crosses a line of sound practice.

[20] Mr P H Nolan, an expert property lawyer, provided an opinion for Mr Halse. Mr Nolan accepts that the non-disclosure is a breach of Rule 5.4.1 but describes it as

"a minor breach, given the relatively small sum of money involved." He adds, "I believe that the majority of practitioners would have overlooked any need to make disclosure in these circumstances." In our view, the amount of money involved, although relevant to gravity, is immaterial to observation of the rule. If not, we invite endless debate about where the line of tolerance lies.

[21] Mr Halse may well have infringed Rule 5.4.2. Absent knowledge, the client had no opportunity to express disquiet. Had he known about Mr Halse's contribution, he may have agreed that it was non-contentious and that their interests corresponded. But he had no opportunity to consider it. The lack of disclosure is not consonant with the tenor of Rule 5 which requires confidence, the sharing of relevant information, as a basis for trust. The same point can be made in relation to Rule 5.4.3.

[22] We respectfully disagree with Mr Nolan's opinion that "it would be taking matters to the extreme" to expect Mr Halse to advise the client of the right to receive independent advice and to explain that he would have to cease to act if a conflict of interest should arise. And, although we understand Mr Nolan's point that the swapping of contributors in a mortgage does not affect the mortgagor, where the practitioner introduces their own funds (in this case, $85,000), that is a material circumstance that should be brought to the client's attention. Even at $15,000, the underlying professional relationship of confidence and trust required disclosure.

Proportionate penalty

[23] We do not regard this matter as one in which a censure would be a proportionate component of penalty. A censure is a permanent mark on a practitioner's record. It is a significant penalty component, not something to be treated as a mere matter of course. The practitioner's oversight did not prejudice his client, even though it fell below what we regard as proper practice. We do not have underlying concern about Mr Halse's professional practice.

[24] We impose a fine of $5,000. Although that is one-third of the maximum possible fine, it is not accompanied by any other penalty. In these circumstances, we

think the fine should be more than negligible. In the overall context, we describe it as a modest fine.

[25] As directed at the hearing, Mr Collins shall file his submissions on costs by 30 March; Mr Gilchrist by 13 April. That said, we encourage the parties to resolve costs between themselves. If it assists with this, we express our tentative view that Mr Halse should meet the Tribunal's costs (via reimbursement to the Law Society in the usual way); and that Mr Halse should meet a fair proportion of the Standards Committee's costs reflecting his admission of Charge One and the withdrawal of Charge Two.

Suppression

[26] Mr Halse did not seek name suppression. The name of the provider, client and associated entities are permanently suppressed.

DATED at AUCKLAND this 19th day of March 2021

Judge JG Adams
Deputy Chairperson

Appendix 1

Chapter 5
Independence

5 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

Independent judgement and advice

5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.

5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.

5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

Conflicting interests

5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.

5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.

5.4.2 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.

5.4.3 A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.

5.4.4 A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent advice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters. This rule 5.4.4 does not apply where—

(a) the client and the lawyer have a close personal relationship; or

(b) the transaction is a contract for the supply by the client of goods or services in the normal course of the client's business; or

(c) a lawyer subscribes for or otherwise acquires shares in a listed company for which the lawyer's practice acts.

5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.