

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2017] NZLCDT 24

LCDT 022/16

**BETWEEN**

**WELLINGTON STANDARDS  
COMMITTEE 2**

Applicant

**PETER JAMES MORAHAN**

Respondent

**CHAIR**

Judge BJ Kendall (retired)

**MEMBERS OF TRIBUNAL**

Mr J Bishop

Mr W Chapman

Mr S Maling

Mr K Raureti

**HEARING** at Tribunals Wellington

**DATE** 17 & 18 August 2017

**DATE OF DECISION** 22 September 2017

**COUNSEL**

Mr D La Hood and Mr I Auld for the applicant

Mr A Beck for the respondent

**REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGES**

[1] The respondent has pleaded not guilty to two disciplinary charges brought by the applicant.

[2] The first charge is under s 112(1)(a) of the Law Practitioners Act 1982 (the 1982 Act). That charge alleges that between 1 August 2002 and 1 August 2008 the respondent engaged in conduct that constituted misconduct in his professional capacity. He is charged in the alternative with conduct unbecoming of a barrister and solicitor (s 112(1)(b) of the 1982 Act). There is a further alternative charge of negligence or incompetence in his professional capacity (s 112(1)(c) of the 1982 Act).

[3] The second charge is under s 241 of the Lawyers and Conveyancers Act 2006 (the 2006 Act). That charge alleges that he engaged in conduct after 1 August 2008 that constituted misconduct pursuant to s 241(a) of the 2006 Act. He is also charged in the alternative with unsatisfactory conduct. (s 241(b) of the 2006 Act). There is a further alternative charge of negligence or incompetence (s 241(c) of the 2006 Act).

[4] Full details of the charges and particulars of the charges are attached as appendix A.

[5] At the commencement of the hearing of the charges on 17 August 2017, counsel for the respondent applied for Charge 1 to be struck out on the ground that it had been laid in contravention of s 351 of the 2006 Act and alternatively for lack of evidentiary foundation.

[6] The Tribunal heard argument from both counsel. It retired to consider the application. It advised counsel that it had declined the application and that it would record its reasons for doing so.

[7] The relevant parts s 351 of the 2006 Act provide:

- “(1) If a lawyer or former lawyer ... is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners act 1982, a complaint about that conduct may be made after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.
- (2) Despite subsection (1), no person is entitled to make under this Act—
- ...
- (b) a complaint in respect of —
- (i) conduct that occurred more than 6 years before the commencement of this section;”

[8] The section commenced on 1 August 2008 (cl 2 Lawyers and Conveyancers Act Commencement Order 2008 SR 2008/182).

[9] Mr Beck submitted that paras [8] to [25] of the particulars relating to Charge 1 concern events that occurred before 1 August 2002 and were relied on by the applicant in relation to that charge (para [52](a) to (c)). His submission was that by so doing, Charge 1 is a complete charge which includes conduct occurring before 1 August 2008. He said that the applicant had refused to separate out the disparate conduct included in charge 1 and that the result must be that the whole of charge must stand or fall together and be dismissed.

[10] The alternative argument for dismissal of Charge 1 was that the applicant had not laid an evidentiary foundation for the charge. With reference to paras [52](d), (e), (f), (g), and (h)] relating to alleged breaches of the rules, the submission was:

- (a) That the complainant had not provided evidence that the respondent was acting for her;
- (b) That the applicant had not provided any evidence of the respondent's prior knowledge about the complainant's affairs;
- (c) That there was no evidence of any advice given by the respondent in respect of relevant transactions.

[11] Counsel for the applicant emphasised that Charge 1 made it clear that it covers only conduct occurring after 1 August 2002 and that the “particulars of the charge” being the “facts and matters relied on” to prove the charge are distinct from the charge itself, (Form A of the Schedule to the Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008).

[12] He accepted that the charge can only be proven by conduct that post dates 1 August 2002. He argued, however, that conduct prior to that date is relevant to consideration of the charge because it would be artificial and inappropriate for a course of conduct to be looked at by only considering evidence relating to part of that course of conduct. He said that the Tribunal’s view of the nature and effect of that conduct needs it to consider the full context of that conduct, which cannot be considered in isolation from, and without reference to, the earlier conduct. He referred the Tribunal to the Court of Appeal’s decision in *Duncan v Medical Practitioners Disciplinary Committee*.<sup>1</sup> That decision was cited by Judge Clarkson in her pre-trial direction of 9 March 2017 on this matter as allowing a course of conduct or a cumulative approach to charging a single charge of misconduct. There was emphasis on the need for such a charge to be appropriate to the width of the case and for the decision maker to transparently consider the gravity of the conduct overall.

[13] The Tribunal reminds itself that the charge can be proved only on findings made in respect of conduct alleged to have occurred after 1 August 2002. It finds that a consideration of related conduct prior to that date is relevant in establishing context. To decline to consider that relevant conduct would create artificiality of the kind contended for by counsel for the applicant. See also *National Standards Committee v Jeanne Denham*<sup>2</sup>.

[14] As to there being no evidential foundation for the charge, the matter can be dealt with directly by saying that the application is premature and should await the hearing of the evidence. We agree with Judge Clarkson’s comment in her direction of 9 March “that pleadings are not evidence”. There has been no challenge that the amended charges fail to inform the respondent of the substance of the allegations made against him.

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<sup>1</sup> *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 537 (CA).

<sup>2</sup> *National Standards Committee v Jeanne Denham* [2017] NZLCDT 10, at [43].

[15] For the reasons set out here the Tribunal declined to dismiss Charge 1.

***Background to Charge 1***

[16] The factual background, which is not disputed, is that the respondent acted as the solicitor for PJ and his family trust. He was also a trustee of the trust. Ms B commenced a de facto relationship with PJ in about July 1998. She owned her own freehold home at that time. In January 1999 PJ and Ms B entered into an agreement to purchase a home at Rosetta Road Raumati. The respondent acted for them both on the purchase.

[17] Ms B loaned \$150,000.00 towards the purchase by taking a mortgage for that amount secured over her home. The respondent acted for her in registering the mortgage.

[18] Mr J and Ms B married in April 1999. In April of that year Ms B was appointed an additional trustee of the family trust and in May 1999 she and her children were added as discretionary beneficiaries of the trust. The respondent acted for all parties on both of these changes.

[19] Title to the Rosetta Road home was transferred into the joint names of PJ and Ms B on 27 July 1999 with the respondent acting on that conveyance. Prior to that they had borrowed \$50,000 from Guardian Assurance Limited which was secured over the property and in respect of which the respondent registered the mortgage against the property.

[20] On 29 February 2000, ownership of the Rosetta Road home was transferred to the trust. The respondent acted for all parties in respect of this transaction.

[21] On 1 March 2002 Ms B was removed as a trustee of the trust.

[22] Ms B sold her home in or around December 2004 and at about that time loaned the net proceeds of the sale (\$60,000.00) to the trust to assist with the purchase of a property at Golf Road, Paraparaumu. The respondent acted on the purchase of that property.

[23] Between February 2000 and July 2005 the trust obtained loans from various financial institutions security for which was provided over the Rosetta Road home. The respondent acted for the trust on those matters. In or around July the respondent acted for the trust in arranging a restructure of the various mortgages so that the property became the subject of a single mortgage in favour of TSB.

[24] The trust sold Rosetta Road for \$680,000.00 in or around July 2005. The net proceeds of sale of \$34,071 were credited to the trust. The respondent acted for the trust in relation to the sale.

***The allegations against the respondent in respect of Charge 1***

[25] The applicant alleges a failure by the respondent to discharge his professional obligations to Ms B as follows:

- (a) In acting for Mr J, Ms B, and the trust he failed to advise her of the conflict of interest or the need to get independent legal advice about the transfer of the Rosetta Road property from joint ownership to the trust;
- (b) By acting for Mr J on the removal of Ms B as a trustee of the trust without first obtaining her consent;
- (c) By continuing to act for the trust and Mr J after her removal as a trustee without obtaining her prior informed consent;
- (d) By acting for Ms B, Mr J, and the trust in respect of the advance of \$60,000 by her to the trust and in respect of the purchase of Golf Road without obtaining her informed consent, advising her of conflict of interest, or advising her to obtain independent legal advice;
- (e) By acting for the trust in respect of arranging additional securities over Rosetta Road without obtaining the prior informed consent of Ms B;
- (f) By acting for the trust on the sale of Rosetta Road without obtaining Ms B's prior informed consent;

- (g) By failing to take sufficient steps to record and maintain appropriate records of the advice he gave to Mr J, Ms B, and the trust when acting for them including in relation to the sale of Rosetta Road and Golf Road.

[26] The respondent's response to these allegations is:

- (a) That he acted with the consent of all parties in respect of the transfer of Rosetta Road to the trust who were aware of the nature and consequences of the transaction;
- (b) That he did not act for the trust in the removal of Ms B as a trustee and that it was not necessary for him to obtain Ms B's consent to continue acting for the trust and Mr J;
- (c) That in respect of the advance of \$60,000 made by Ms B in December 2004, he had no duty to advise Ms B because she was informed in 2003 that she was no longer a trustee;
- (d) That in respect of the purchase of Golf Road, he was under no duty to Ms B because he was acting for the trust;
- (e) That he was under no duty to advise Ms B in respect of the various loan transactions over Rosetta Road, because he was not acting for her.

[27] The respondent also generally denies the allegations set out in para [25].

[28] The complainant Ms B gave evidence the focus of which was that she at all times believed that she and Mr J were the joint owners of Rosetta Road. She had no knowledge that it had been transferred into the trust. She says she did not know of the transfer until the sale of the property arose in 2005.

[29] She said also that she did not know until her separation in 2009 that she had been removed as a trustee in March 2002.

[30] The respondent gave evidence and was cross-examined. He acknowledged that he acted as solicitor for Ms B in respect of the following matters:

- (a) On the purchase of Rosetta Road;
- (b) On the borrowing of \$150,000 secured against her Tolhurst Road property;
- (c) On the subdivision of Rosetta Road;
- (d) The transfer of that property to the trust;
- (e) The process of her becoming a trustee of the trust.

[31] The respondent admitted that he had an obligation to protect Ms B's interest in respect of those matters. It is clear that she was not given independent advice about any of the relevant issues at the time.

[32] The respondent explained that (with the exception of the Rosetta Road property transfer to the trust) he did not see a need for independent advice because he did not recognise any conflict between Ms B and Mr J.

[33] In respect to the transfer of Rosetta Road to the trust he said he told Ms B about independent advice but said that she did not want it.

[34] The respondent was unable to point to any written record of that advice. He accepted that it was the kind of matter that would be expected to be documented.

[35] Nor we note were records produced of any advice given about the implications of the transfer for Ms B's property interests. Indeed the paucity of adequate records which would have helped to explain how the respondent discharged his obligations to the various parties he was acting for over a long period, was a feature of this case.

[36] We also observe given the dealings which were to follow this transfer and which are the subject of the charge that her situation directly raised an on-going need to advise on separate representation and to do this in a way which set out the reasons why, if an informed consent, which was a prerequisite to the respondent continuing to act, was to be given.

[37] Leaving aside issues of relationship property, the Rosetta Road transfer to the trust had the legal effect to convert Ms B's freehold interest in Rosetta Road to a discretionary interest under the trust, and one which was revocable at the will of her husband the Settlor.

[38] Absent any direct evidence on the point or any file notes from the respondent to substantiate this, we cannot conclude that Ms B was adequately advised in a way which would have put her in a position to understand the implications of the transfer and thus give an informed consent.

[39] Again in this context, the evidence we heard from Ms B suggests, both on the transfer of Rosetta Road to the trust and just when and how she learned of her removal as a trustee, she was at best confused as to what had occurred and when, and strongly suggests she had no clear guidance from the respondent.

[40] In 2002 the parties separated for the first time. This seems to have been the catalyst for her removal as a trustee from the trust. Once again the respondent was involved both as solicitor to the trust and as a trustee.

[41] It is a feature of her removal that it was carried out by her co-trustees without her knowledge or consent at the time and without her having any opportunity to consider her position or take advice. That was unfortunate, because it now seems the removal was neither within the trustees' powers nor carried out within the prescribed process under the Trustee Act 1956.

[42] It is also a feature that her co-trustee and the solicitor of the trust chose not to inform her personally of this removal. Instead, he explained, he left that up to PJ from whom she was estranged at the time. Mr J is adamant that he told her. She is equally adamant that she did not find this out until some years later. Our attention was drawn to a letter from the respondent to a solicitor acting for her on relationship property in 2003 which referred to her removal as trustee but Ms B explained she never saw that. The parties reconciled not long after.

[43] Whilst we make no finding against the respondent in respect to any of his conduct prior to 1 August 2002 we are satisfied that his actions fell well short of his

duty to his client at that time, but more importantly had ongoing implications for what was to follow.

### ***Discussion***

[44] There was a clear failure by the respondent to ensure that the complainant was independently advised in respect of those early transactions and that failure disadvantaged his client. Following her removal as a trustee in March 2002 it seems the respondent took the view she was no longer his client. This was never communicated to her in any meaningful way. Thereafter, as the respondent put it, and he has so pleaded, he claims he was no longer under any duty to Ms B.

[45] The respondent said that he did not turn his mind to whether or not he had a duty to Ms B in respect of the subsequent borrowings against Rosetta Road. He accepted that, with hindsight, he should have been vigilant to be aware of that. He also accepted that he had an obligation to a former client which might go as far as having to say that he could no longer act for any of the parties involved.<sup>3</sup>

[46] The respondent said in his evidence that he did not know about the advance of \$60,000 by Ms B to the trust in 2004. That advance appears to have been made to assist with the purchase of the Golf Road property. And he repeated his claim that he was not acting for her and owed her no duty. But this rather overlooks the fact that as solicitor for the trust and as a trustee he would be expected to understand just how the transaction was to be financed and it was most relevant for him to know the source of funds coming through. Had he inquired it may well have been made plain that Ms B was advancing money and was confused about her position as a trustee of the trust.

[47] He did accept that, when he acted for the trust on the sale of Rosetta Road, Ms B's interest was unprotected in respect to her advance of \$150,000. We take the view that he would have been aware that no-one else was acting for her on this transaction and it should have been plain to him then that he had an irreconcilable conflict on his hands because his former client was now exposed to risk on the

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<sup>3</sup> Transcript page 73 lines 11 – 16.

transaction and that needed to be disclosed and explained. Absent her informed consent it was inappropriate for him to act for any of the parties involved.

[48] He justified his position, amongst other things, by saying that no-one at any stage took issue with his continuing to act for Mr J and the trust. On two occasions, one in 2002 and the other in 2003, Ms B took advice elsewhere. On the first occasion she was challenging a decision to list Rosetta Road for sale without her authority. On the second, she was seeking disclosure of property dealings by the trust. And much later again, following their permanent separation, Ms B consulted other solicitors in relation to relationship property. No-one he said complained of his continuing to act for Mr J or the trust.

[49] He agreed however when pressed that the fact that no-one objected did not absolve him from his professional obligations.

[50] The Tribunal has regard to the admissions that the respondent has made under extensive cross-examination. It concludes that the respondent breached his professional obligations to Ms B over the period from at least December 2004 through to July 2005. And there were other breaches as well prior to December 2004 in the period backdated to August 2002 in respect of borrowings against Rosetta Road. Those breaches involved his failure to recognise that he had conflicting obligations to Ms B either as an existing or former client and to the trust and his client Mr J in a situation where he was not free to act without proper informed consents and in circumstances where, had the position been fully explained to Ms B, to so act could reasonably be expected to be objectionable.

[51] The Tribunal records that those breaches are of concern because:

- (a) The equity in Rosetta Road was substantially eroded against the interest of the complainant; and
- (b) It must have been apparent to the respondent that no one else was protecting Ms B's interests in these transactions and that her interests were at risk; and

- (c) There is confusion around the whether the solicitor client relationship had ended within the period in question. On the respondent's view of the matter, Ms B was a former client from as early as March 2002 when she was removed as a trustee. But on Ms B's view she was unaware of that until some years later. The evidence contradicting her is equivocal and at best invites a conclusion that she may well have been confused about aspects of both property ownership and her position as a trustee; and
- (d) On any view of it the advice which the respondent gave to Ms B in these circumstances was inadequate and it is plain he did not have her informed consent to his continuing to act for Mr J and the trust; and
- (e) He had prior knowledge of her affairs relevant to the matters in issue which if he continued to act had the potential to be to her detriment or could reasonably be expected to be objectionable.

[52] The Tribunal is also concerned to note that as early as 24 October 2003 in a letter from Steven Kirkeby to the respondent requesting a full disclosure of property dealings by the trust, Mr Kirkeby directly raised the question of whether or not Ms B had been independently advised before entering into transactions with and on behalf of the trust. Whether there was any reply we were not told, but at all events it must have been plain from that letter that the property investment activities of the trust and the respondent's own actions in relation thereto would be a matter for scrutiny should relationship property need to be sorted. That alone should have reminded the respondent that he needed to give careful consideration to his own position in the matter.

[53] The Tribunal finds that the conduct of the respondent in the period from August 2002 to August 2008 is in breach of Rules 1.05 and 1.07 of the relevant Rules of Professional Conduct for Barristers and Solicitors.

[54] The Tribunal considers that the respondent allowed himself to be drawn into a situation where he ignored the rights of the complainant because of the longstanding client relationship he had with PJ. He further overlooked that he had obligations to his fellow trustees and in that context particularly Ms B.

[55] The Tribunal finds that the respondent's conduct reaches the threshold of negligence or incompetence in his professional capacity, to such a degree that it reflects on his fitness to practise as a barrister or solicitor or tends to bring the profession into disrepute. (s 112(1)(c) of the 1982 Act).

[56] Charge 1 is accordingly proved.

### ***Background to Charge 2***

[57] The factual background to this charge is not disputed.

[58] Ms B and PJ separated on 11 July 2009. The respondent prepared and executed a deed on 27 August 2009 which removed her and her adult children as beneficiaries of the trust. Then on 16 September 2009 the respondent acted for the trust in the eviction of Ms B from the trust's Golf Road property.

[59] On 22 May 2012, the respondent wrote to Ms B's lawyer, Mr Harrison, requiring her to give possession of a BMW car to Mr J by delivering it to the respondent's offices and reserving the right to instruct a repossession agent to uplift the car.

[60] In December 2012 Ms B brought proceedings in the Family Court against Mr J and the trustees of the family trust. The respondent acted as solicitor on the record for Mr J and the trustees of the trust (including himself). He filed a defence to the proceedings dated 17 January 2013 on behalf of Mr J and the trustees which denied that the Rosetta Road property was purchased by Mr J and Ms B.

[61] The respondent gave evidence in the Family Court during which he said that the trust had purchased the Rosetta Road property.

[62] Orders for discovery were made for discovery of documents in the Family Court proceedings following which there was a failure to locate/discover documents relating to the purchase of the Rosetta Road property.

***The allegations against the respondent regarding Charge 2***

[63] Against those background facts, the applicant alleges that the respondent acted for Mr J and the trust contrary to rule 8.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules) by reason of the following:

- (a) He held confidential information of Ms B disclosure of which would have been likely to adversely affect her interests;
- (b) There was more than a negligible risk of disclosure of the confidential information;
- (c) The fiduciary obligation owed to Ms B would be undermined.

[64] There was the further allegation that the respondent's conduct in acting for Mr J and the trust against the interests of Ms B was such that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. (s 12(a) of the 2006 Act).

[65] The applicant goes on to allege that the respondent acted contrary to the rules in the following respects:

- (a) That he acted in the Family Court proceedings when he knew he might be required to give evidence of a contentious nature and/or where his conduct and/or advice was in issue. (rules 13.5.1 and 13.5.3 of the rules of 2008).
- (b) That he gave evidence in the Family Court proceedings that he knew or ought to have known was false and/or misleading. (rules 3, 13.1 and 13.10 of the rules of 2008).
- (c) That he filed pleadings in the Family Court which he knew or ought to have known were false and/or misleading.
- (d) That he failed to comply with Orders for Discovery thereby failing to maintain proper standards of professionalism and/or comply with his

obligations as an officer of the Court in relation to the Family Court proceedings. (rules 13.1 and 13.9 of the rules of 2008).

[66] The respondent has denied all the above allegations.

[67] The applicant has asserted that the respondent held confidential information concerning Ms B acquired in the course of a professional relationship. Counsel referred to the loan she took out against her own home at the time of the purchase of Rosetta Road and then in relation to the sale of the house she owned individually. He also referred to the sale of Rosetta Road to the trust. He argued that, as a result of his so acting, the respondent held confidential information from Ms B. He argued that continuing to act in the circumstances alleged undermined the fiduciary obligation which the respondent owed to Ms B.

[68] The respondent was cross-examined about his comments on the character of Ms B which he made to the Law Society in a letter of 11 October 2013. There he described Ms B as being a liar and deceitful. He agreed that his view about her had come from Mr J.

[69] The applicant has criticised the respondent for acting in the Family Court proceedings where he might be required to give contentious evidence or where his conduct and/or advice was in issue. Counsel submitted that the respondent's advice was in issue in respect of the Rosetta Road property, he having acted on the purchase of it and on the transfer of it to the trust, such that he ought to have known that he may be required to give evidence of a contentious nature in the matter. That question became central to the Family Court proceedings.

[70] The applicant challenges the filing by the respondent of the defence pleading in the Family Court proceedings wherein he said that the Rosetta Road property was purchased by the trust. In his evidence in court the respondent accepted that such a denial was incorrect. Counsel submitted that the respondent knew or ought to have known that the filing of the defence was false and/or misleading. He argues that the respondent did not act competently and/or did not take reasonable care in making the statements and so was in breach of rule 3.

[71] In respect of the allegation that the respondent failed to maintain a proper standard of professionalism and/or comply with obligations as an officer of the court, counsel relies on the following matters:

- (a) The respondent filed an affidavit of documents made by Mr J and dated 2 May 2011 stating that full discovery of documents had been made including diligent enquires for search and retrieval of all documents sought. The respondent's electronic trust accounts were not disclosed.
- (b) On 5 December 2011 the respondent was directed to produce all electronic trust account records relating to the transactions.
- (c) On 27 January 2012 the respondent filed an affidavit of Mr J that produced the electronic trust account record for the purchase of the Rosetta Road property which showed that his clients were Ms B and Mr J. Pages were missing from the document.
- (d) Further application was made to the court on 16 May 2012 on behalf of Ms B for discovery and production of documents, including electronic trust account records for all sale and purchase transactions undertaken by the respondent on behalf of Mr J, Ms B, and/or the family trust.
- (e) The respondent filed a further affidavit of Mr J on 24 July 2012. In that affidavit Mr J said that he had been advised there were more trust account and settlement statement records for eight property purchases. He went on to say that Ms B could obtain those documents from the respondent if she paid the cost of retrieval.
- (f) On 17 September 2012 a further affidavit (sworn by Mr J) was filed attaching the second page of the respondent's electronic trust account records which showed the funds received from the sale of the section that had been subdivided from the Rosetta Road property.
- (g) On the second day of the hearing in May 2013, the respondent said that he had found his conveyancing file. He produced a copy of the

Agreement for Sale and Purchase which showed that the property had been purchased by Mr J and Ms B.

### ***Discussion***

[72] The Tribunal accepts that the respondent had prior knowledge of Ms B's affairs relevant to the matters in issue (relating to property transactions) but it is less clear in the circumstances of this case that it was information which if he continued to act had the potential to be to her detriment or could reasonably be expected to be objectionable (para [47](e)). The focus of the complaint here was the respondent's continuing to act for Mr J and the trust in the Family Court proceedings.

[73] The respondent has not disputed the fact of acting for Mr J and the trust in the Family Court proceedings. His defence is that in doing so there has been no breach of confidentiality or that he was acting in contravention of the rules.

[74] In support of that defence his counsel submitted that:

- (a) There is no reference in the evidence to confidential information held by the respondent;
- (b) The respondent's evidence was that he had no material from Ms B that could be regarded as confidential, disclosure of which would somehow prejudice her in the various transactions that occurred.

[75] Rule 8.7 of the rules sets out four requirements all of which must be met to require that a lawyer must not act for a client against a former client of that lawyer. They are:

- (a) That a lawyer holds information confidential to the former client; and
- (b) Disclosure of that confidential information would be likely to affect the interests of the former client adversely; and
- (c) There is more than negligible risk of disclosure of the confidential information; and

(d) The fiduciary obligation owed to the former client would be undermined.

[76] We have found that the respondent held confidential information covered by the rule. The rule has four elements that are cumulative. We have to be satisfied that all elements are proved to the required standard.

[77] The question becomes whether disclosure of the information would affect Ms B adversely. (rule 8.7(b)) In the context of the Family Court proceedings disclosure of the information assisted her positively by confirming that she personally, not the trust, was an original purchaser for Rosetta Road, thus enabling the Court to make a positive finding in her favour. See the judgment of Judge Grace at paras [18] to [20] in his decision of 31 July 2014<sup>4</sup>.

[78] Absent the element of adverse affect, the Tribunal finds that the respondent has not breached rule 8.7 of the rules of 2008.

[79] Before reaching that conclusion, the Tribunal has given serious consideration to the remarks of Edwards J in *Morris v Morris*<sup>5</sup> where he said at para [26]:

“[26] At first glance, the lengthy relationship Mr Walker has had with both parties to the dispute raises the spectre of justice being subverted. It may be readily inferred that Mr Walker has obtained knowledge of Mr Morris’s affairs, or at the very least, his personality traits, fears and foibles as a result of knowing Mr Morris for a long period of time. That alone suggests that the safer course may have been for Mr Walker to decline to act for any of the parties once litigation had commenced.”

[80] The Tribunal concluded that personal information held by the respondent did not amount to a breach of the rule having regard to the length of time that had passed since he had acted for Ms B personally and his admission that his view of her personality was a view gained primarily from what Mr J had told him.

[81] The Tribunal however does endorse the remarks of Edwards J. It considers that in most cases it will not be appropriate for a lawyer who has acted for both parties to a marriage to continue to act for one party against the other in subsequent contested relationship property proceedings.

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<sup>4</sup> *RJ v PGJ and PGL, PJM and BJK the trustees of the PGJ Trust* [2014] NZFC 6010.

<sup>5</sup> *Morris v Morris* [2015] NZHC 2315.

[82] We find this to be the situation here. The respondent should never have been acting in the contested relationship property proceedings given the additional circumstance that he was a party to the Family Court proceedings as well.

[83] Not only did the lawyer here act against his former client he presented the case in such a way as to compel her to call correcting evidence from the lawyer himself adding complexity and delay and inevitable consequential added cost. See again the judgment of Judge Grace at paras [18] to [20] in his decision of 31 July 2014<sup>6</sup>.

[84] The respondent makes the following points in his defence to the allegations that he acted unprofessionally in respect of his acting in the Family Court proceedings when he knew he might be required to give evidence of a contentious nature or when his conduct of advice was in issue. (rules 13.5.1 and 13.5.3 of the rules of 2008).

- (a) There was no indication at the time of the commencement of the proceedings that the respondent would be required to give evidence of a contentious nature.
- (b) The evidence relating to the purchase of the Rosetta Road property was not a contentious matter because it could have been established from the certificate of title.
- (c) It was not necessary for the respondent to give evidence on the point.

[85] The Tribunal finds that the respondent was in breach of rule 13.5.1 and 13.5.3 in so acting. The issue of who purchased the Rosetta Road property was put in contention at the commencement of the proceedings. The statement of defence not only denied that Mr J and Ms B purchased the property but went on to say that the trust had purchased the property<sup>7</sup> thus raising a positive defence.

[86] The Tribunal has no reason to disagree with the remarks of Judge Grace in his decision on costs dated 31 July 2014<sup>8</sup> where he said:

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<sup>6</sup> See 4 above.

<sup>7</sup> Affidavit of Ms B dated 6 December 2016, exhibit 36.

<sup>8</sup> See 4 above at [18].

“This case involved a situation where the solicitor acting for the respondent husband, and who was a trustee in the trust, also purportedly acted for the applicant on the sale of her property and on the purchase of a new property by the parties jointly. It was he who claimed that the property had been purchased by the trust whereas in fact it had not been. It was his trust account which, when disclosed, established that funds flowed through to the respondent husbands trust account and not through a trust account in the name of the trust. That much (sic) have been known to that solicitor.”

[87] Counsel for the respondent submits that the respondent did not breach any of the rules in filing the statement of defence to Ms B’s claim. He submitted:

- (a) The pleadings were settled by Mr Delany as counsel for the defendants and that the solicitor on the record (the respondent) would have had no part in settling the pleadings.
- (b) The pleadings are not evidence. A statement can be denied in order to put a party to the proof of it.
- (c) There is no case for disciplinary action on the basis of an allegation denied in a pleading which later turns out to be correct.

[88] Pleading a simple denial of an allegation may be acceptable in that it puts the person making the allegation to the proof. Where the pleading goes on to allege a different factual matter to that pleaded, then the counter allegation made must not be false and/or misleading.

[89] The respondent was the person in possession of all the relevant information relating to the claim of Ms B, being documentation and trust account records which disclosed the correct factual situation. The respondent was the instructing solicitor of counsel. It was he who had the duty to ensure that counsel was properly briefed to ensure the accuracy of pleadings in response to the claim.

[90] The Tribunal therefore finds that the respondent must take responsibility for incorrectly pleading in the statement of defence that “the original proprietors of [x]

Rosetta Road were the Plaintiff and the first and second named defendants as trustees of the PGJ Trust”.<sup>9</sup>

[91] The final matter for consideration is that the respondent breached rule 13.1 and 13.9 of the 2008 rules by failing to comply with the discovery orders made by the Family Court. Details of the orders for discovery are stated in para [71] above. It is not necessary to repeat them.

[92] The respondent argues that as the orders were not made against him, he was not in breach of them. His counsel submitted that the only discovery obligations were those resting on Mr J.

[93] Counsel is correct that no order was made against the respondent personally requiring him to make discovery.

[94] Rule 13.9 of the 2008 rules requires a lawyer acting for a party to ensure that discovery obligations are fully complied with by the lawyer’s client. The respondent was the person in possession of the material about which discovery was required. It was he who had the obligation under the rule to ensure that Mr J made full discovery. The Tribunal again refers to the decision of Judge Grace on costs where he said at para [19]:

“The trustees persisted in denying a factual situation which they either knew to be incorrect, or at the very least, had documentation they either refused to disclose or acknowledge, until well into the hearing of this matter.”

[95] It has found that the respondent has breached the rules:

- (a) By acting in the Family Court proceedings;
- (b) By allowing the filing of pleadings that were false and or misleading; and
- (c) Being in breach of his obligations relating to discovery.

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<sup>9</sup> See 5 above at [6] and [12].

[96] The Tribunal finds that the respondent's conduct reaches the threshold of negligence or incompetence in his professional capacity, to such a degree that it reflects on his fitness to practise as a barrister or solicitor or tends to bring the profession into disrepute. (s 241(c) of the 2006 Act).

[97] The Tribunal finds Charge 2 proved.

[98] The Tribunal directs that submissions on penalty be filed by the applicant by 6 October 2017. Counsel for the respondent is to reply by 20 October 2017. Penalty will be decided on the papers unless either of counsel requests a hearing.

**DATED** at AUCKLAND this 22<sup>nd</sup> day of September 2017

BJ Kendall  
Chairperson

**Charge 1:**

The Wellington Standards Committee 2 of the New Zealand Law Society (“the Standards Committee”) charges Peter James Morahan (“the practitioner”), of Lower Hutt that he committed a disciplinary offence under s 112 of the Law Practitioners Act 1982 (“the 1982 Act”), in that he engaged in conduct between 1 August 2002 and 1 August 2008 that constituted:

- (a) Misconduct in his professional capacity, pursuant to s 112(1)(a) of the 1982 Act;  
or in the alternative
- (b) Conduct unbecoming of a barrister and solicitor, pursuant to s 112(1)(b) of the 1982 Act;  
or in the alternative
- (c) Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute, pursuant to s 112(1)(c) of the 1982 Act.

As particularised below.

**Charge 2:**

The Standards Committee further charges Peter James Morahan, of Lower Hutt, that he committed a disciplinary offence under s 241 of the Lawyers and Conveyancers Act 2006 (“the 2006 Act”), in that he engaged in conduct on or after 1 August 2008 that constituted:

- (a) Misconduct, pursuant to s 241(a) of the 2006 Act, in that it was conduct that:
  - (i) would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable: s 7(1)(a)(i) of the Act; and/or
  - (ii) consisted of a wilful or reckless contravention of the Act and/or practice rules or regulations made under the Act: s 7(1)(a)(ii) of the 2006 Act;
 or in the alternative
- (b) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct pursuant to section 241(b) of the 2006 Act;  
or in the alternative
- (c) Negligence or incompetence in his professional capacity, and the negligence or incompetence has been of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute pursuant to s 241(c) of the 2006 Act.

As particularised below.

*The particulars of the charges are that (fact and matters relied upon):*

1. At all material times, the practitioner held a practising certificate as a barrister and solicitor issued under the 1982 Act or the 2006 Act.
2. At all material times, the practitioner acted as the solicitor for the PGJ Trust ("the Trust") and its settlor, Mr J ("Mr J").
3. At all material times the practitioner was a trustee of the Trust.
4. In or about July 1998, Mr J commenced a de facto relationship with Ms B ("Ms B").
5. As at July 1998, Ms B owned a freehold property at [x] Tolhurst Street, Johnsonville ("the Tolhurst Road Property").
6. Mr J and Ms B married in April 1999. Ms B took Mr J's surname.
7. On 28 January 1999 Mr J and Ms B jointly entered into an agreement to purchase a property at [x] Rosetta Road, Raumati (the Rosetta Road Property). The settlement date was 26 February 1999.
8. The practitioner acted for both Mr J and Ms B in relation to the purchase of the Rosetta Road Property.
9. Ms B loaned \$150,000 from TSB Bank to fund the purchase of the property at Rosetta Road. The loan was secured by a mortgage over the Tolhurst Road Property.
10. The practitioner acted for Ms B in respect of arranging the loan and registering the mortgage over the Tolhurst Road Property.
11. On or about 20 April 1999, Mr J appointed Ms B as an additional trustee of the Trust.
12. On or about 6 May 1999, the trustees added Ms B and her children (from an earlier relationship), as discretionary beneficiaries of the Trust.
13. Title to the Rosetta Road Property transferred to Mr J and Ms B jointly on 27 July 1999.
14. On or about 15 June 1999, Mr J and Ms B jointly borrowed \$50,000 from Guardian Assurance Limited. This loan was secured by a mortgage against the Rosetta Road Property.
15. The practitioner acted for Mr J and Ms B in respect of the loan from Guardian Assurance Limited.
16. The money loaned from Guardian Assurance Limited on 15 June 1999, secured against the Rosetta Road Property, was used to fund improvements to and subdivision of the Rosetta Road Property.
17. In or around October 1999, the Rosetta Road Property was subdivided. The practitioner acted for Mr J and Ms B in relation to the subdivision of the Rosetta Road Property.
18. On 29 February 2000, ownership of the Rosetta Road Property was transferred to the Trust.

19. The practitioner acted for Mr J Ms B and the Trust in respect of this transfer.
20. The practitioner did not advise Ms B of the potential conflict of interest, advise her to seek independent legal advice, or obtain informed consent from her to continue to act, prior to the transfer of the Rosetta Road Property into the Trust.
21. The practitioner failed to take appropriate steps to acknowledge and safeguard Ms B's interests in the property at Rosetta Road. The practitioner did not provide advice to Ms B regarding the risk to her in the transaction of the transfer, nor in relation to the potential for conflict in his acting for Ms B, Mr J and the Trust, as well as the practitioner being a trustee.
22. Ms B was removed as a trustee of the Trust on 1 March 2002.
23. The practitioner acted for the Trust in relation to the removal of Ms B as a trustee.
24. As at 1 March 2002, the practitioner was also a trustee of the Trust.
25. At no point did the practitioner obtain informed consent from Ms B for him continuing to act for the Trust or for Mr J.
26. In or around December 2004, Ms B sold the Tolhurst Road Property. Ms B received, as proceeds of the sale, approximately \$60,000.
27. In or around December 2004, Ms B advanced \$60,000 to the Trust for the purchase of a property at Golf Road, Paraparaumu (the Golf Road Property).
28. At the time Ms B advanced this sum to the Trust she was not aware/had not been advised that she was no longer a trustee for the Trust. The practitioner failed to advise her of the same, and did not advise her of the potential conflict of interest or advise her to seek independent legal advice, or obtain her informed consent to act for the Trust in those circumstances.
29. On or about 2 December 2004 the Trust purchased the Golf Road Property.
30. The practitioner acted for the Trust, Mr J and Ms B in relation to the purchase of the Golf Road Property.
31. The practitioner did not advise Ms B of the potential conflict of interest or advise her to seek independent legal advice concerning the purchase of the Golf Road Property. The practitioner did not obtain informed consent from Ms B, to act for the Trust and Mr J also, in circumstances where Ms B was no longer a trustee of the Trust.
32. The practitioner did not maintain appropriate records of the advice he provided to Mr J, Ms B and/or the Trust when acting for them in relation to the purchase of the Golf Road Property.
33. Between February 2000 and July 2005, the Trust loaned various amounts from various financial institutions and provided security over the Rosetta Road Property for those loans. The Practitioner acted for the Trust in respect of obtaining these loans and arranging security over the Rosetta Road Property.

- (a) In or around July 2005, the practitioner acted for the Trust in arranging a restructure of various mortgages over the Rosetta Road Property, resulting in the Rosetta Road Property becoming subject to a single mortgage in favour of TSB Bank.
34. The practitioner failed to take appropriate steps to acknowledge and safeguard Ms B's interests in the Rosetta Road Property. The practitioner did not advise Ms B to seek independent legal advice concerning the effect of the securities on her interest in the Rosetta Road Property when he knew, or should have known, that the securities would have a negative impact on her interests.
35. In or around July 2005, the Trust sold the Rosetta Road Property for \$680,000. After payment of the mortgage on the Rosetta Road Property totalling \$596,092, and payment of other liabilities (including the land agent's commission and solicitors fees), there was a balance of \$34,071 credited to the Trust.
36. The practitioner acted for the Trust in relation to the sale of the Rosetta Road Property.
37. The practitioner did not maintain appropriate records of the advice he provided to Mr J, Ms B and/or the Trust when acting for them in relation to the sale of the Rosetta Road Property.
38. Mr J and Ms B separated on 11 July 2009. However, they continued to live together at the Golf Road Property.
39. On 27 August 2009, the practitioner prepared and executed a deed which removed Ms B and her adult children as beneficiaries of the Trust.
40. On 16 September 2009, the Trust evicted Ms B from the Golf Road Property.
41. The practitioner acted for the Trust in relation to the eviction of Ms B from the Golf Road Property.
42. On 22 May 2012, the practitioner wrote a letter, on behalf of Mr J, to Ms B's solicitor, Mr Harrison, asking Ms B to give possession of a BMW motor vehicle over to Mr J by delivering it to Mr Morahan's offices, and warning that if she failed to do so by 25 May 2012 then Mr J reserved his right to instruct a repossession agent to uplift the vehicle.
43. As a result of a dispute arising out of the separation of Mr J and Ms B, in December 2012, Ms B brought proceedings in the Family Court against Mr J and the trustees of the Trust ("the Family Court Proceedings").
44. The practitioner acted as solicitor on the record for Mr J and the trustees of the Trust, including himself, during the Family Court Proceedings.
45. At no point did the practitioner obtain written consent from Ms B to him acting for the Trust or for Mr J in the proceedings, against her interests.
46. The practitioner failed to take any practical steps to consider whether he would be in compliance with rule 8.7.1 before deciding to act for Mr J and the Trust against Ms B.

47. The statement of claim filed by Ms B stated “That on or about 19 February 1999, the Plaintiff and the Defendant PJ purchased a property at [x] Rosetta Road, Raumati”.
48. The practitioner filed a notice of defence, dated 17 January 2013, on behalf of Mr J and the other trustees of the Trust, which denied that the Rosetta Road Property was purchased by Mr J and Ms B, when he knew, or ought to have known, that the Rosetta Road Property had been purchased by Ms B and Mr J.
49. On or about 27 May 2013, the practitioner gave evidence on behalf of the Trust in the Family Court Proceedings. In the course of that evidence, the practitioner maintained that it was the trust, rather than Mr J and Ms B, that had purchased the Rosetta Road Property in 1999, when he knew, or ought to have known, that this was not true.
50. On 15 April 2011, Judge Ullrich QC made orders for discovery of documents in the Family Court Proceedings, under s 44B of the Property (Relationships) Act 1976 (“the Discovery Orders”). The discovery orders required discovery of documents relating to the purchase of the Rosetta Road Property by Mr J and Ms B in 1999.
51. Following the Discovery Orders, the practitioner failed to locate and/or discover the documents within his control relating to the purchase of the Rosetta Road Property by Mr J and Ms B in 1999 until during the hearing of the Family Court Proceedings in May 2013, in contravention of the Discovery Orders.

**Therefore the practitioner committed charge 1 referred to above, as follows:**

52. The practitioner failed to discharge his professional obligations to Ms B as follows:
  - (a) The Standards Committee refers to paragraphs 20 and 21 above. In acting for Mr J, Ms B and the Trust in respect of the transfer of the Rosetta Road property from Mr J and Ms B to the Trust, without obtaining the prior informed consent of Ms B, advising her of the conflict of interest or advising her to obtain independent legal advice, the practitioner breached rules 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
  - (b) The Standards Committee refers to paragraph 22 above. In acting for Mr J in respect of the removal of Ms B as a trustee of the Trust, without obtaining the prior informed consent of Ms B, the practitioner breached rules 1.05 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
  - (c) The Standards Committee refers to paragraphs 22 to 25 above. In continuing to act for the Trust and Mr J, without obtaining the prior informed consent of Ms B, the practitioner breached rules 1.05 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
  - (d) The Standards Committee refers to paragraphs 26 to 28 above. In acting for both Ms B and the Trust in respect of the advance of \$60,000 from Ms B to the Trust, without obtaining the prior informed consent of Ms B, advising her of the conflict of interest or advising her to obtain independent legal advice, the practitioner breached rules 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or

- (e) The Standards Committee refers to paragraphs 29 to 31 above. In acting for Mr J, Ms B and the Trust in respect of the purchase of the Golf Road Property, without obtaining the prior informed consent of Ms B, advising her of the conflict of interest or advising her to obtain independent legal advice, the practitioner breached rules 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
- (f) The Standards Committee refers to paragraphs 33 and 34 above. In acting for the Trust in respect of arranging securities over the Rosetta Road property, without obtaining the prior informed consent of Ms B, the practitioner breached rules 1.05 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
- (g) The Standards Committee refers to paragraph 36 above. In acting for the Trust in respect of the sale of the Rosetta Road Property, without obtaining the prior informed consent of Ms B, the practitioner breached rules 1.05 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors; and/or
- (h) The Standards Committee refers to paragraphs 32 and 37 above. The practitioner failed to take sufficient steps to record and maintain appropriate records of the advice he provided to Mr J, Ms B and/or the Trust when acting for them, including in relation to the sale of the Rosetta Road Property and the purchase of the Golf Road Property.

**And / or, the practitioner committed charge 2 as follows:**

- 53. The Standards Committee refers to paragraphs 39 to 46 above. The practitioner acted for Mr J and the Trust in circumstances where:
  - (a) The practitioner held confidential information of Ms B;
  - (b) Disclosure of that information would have been likely to adversely affect Ms B's interests;
  - (c) There was more than a negligible risk of disclosure of the confidential information;
  - (d) The fiduciary obligation owed to Ms B would be undermined; and
  - (e) contrary to rule 8.7 of the Rules of Conduct and Client Care; and / or
  - (f) The conduct of the practitioner in acting for Mr J and the Trust against the interests of Ms B, a former client, was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, contrary of rule 12(a) of the Lawyers and Conveyancers Act 2006; and/or
- 54. The Standards Committee refers to paragraph 44 and 49 above. The practitioner acted in the Family Court Proceedings when he knew he might be required to give evidence of a contentious nature and / or where his conduct and / or advice was in issue in the matter before the court, contrary to any or all of rules 13.5.1 and 13.5.3 of the Rules of Conduct and Client Care; and / or

55. The Standards Committee refers to paragraph 47 to 49 above. The practitioner filed pleadings and gave evidence in the Family Court Proceedings that he knew, or ought to have known, were false and /or misleading, in contravention of rules 3, 13.1 and 13.10 of the Rules of Conduct and Client Care; and/or
56. The Standards Committee refers to paragraphs 50 to 51 above. By failing to comply with the Discovery Orders, the practitioner failed to maintain proper standards of professionalism and/or comply with his obligations as an officer of the Court in relation to the Family Court Proceedings, contrary to rules 13.1 and 13.9 of the Rules of Conduct and Client Care.