NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 22

LCDT 032/17

UNDER	The Lawyers and Conveyancers Act 2006
IN THE MATTER OF	Disciplinary Proceedings Under Part 7 of the Act
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**RICO SCOTT HORSLEY** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Mr W Chapman

Ms S Hughes QC

Mr P Shaw

Mr W Smith

HEARING 12 and 13 April 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 26 June 2018

COUNSEL

Mr S Waalkens for the Standards Committee

Mr P Napier and Ms N Pye for the Practitioner

DECISION OF THE TRIBUNAL ON CHARGE

Introduction

[1] Mr Horsley faces one charge of misconduct which is laid with alternative charges of negligence and unsatisfactory conduct. All three levels of culpability are denied by the practitioner.

[2] Mr Horsley advised two clients in the transfer of a property from a Tenancy in Common as to a two-thirds and a one-third share, into a Joint Tenancy.

[3] Mr Horsley had been approached by MS, the owner of the one-third share and his instructions came initially from her. MS said that the instructions were the joint wish of her and VG, the owner of the two-thirds share.

[4] MS disclosed that VG was her great aunt, but did not initially disclose to the practitioner that VG was 92 years old or mention anything about her health and capacity.

[5] Neither did she disclose the existence of an enduring power of attorney given by VG to KS, who assisted her with her personal property matters and possibly property matters in which she was involved as a trustee (although such assistance would have been outside the scope of the enduring power of attorney ("EPA").

[6] KS was not consulted about the transaction, the subject of the complaint. He was advised some days later by VG who contacted him to say she had signed a document which she could not recall.

[7] That set in motion a chain of events which led to a complaint being made against the practitioner and ultimately this charge.

Issues

[8] The Tribunal must determine the following issues:

1. Has Mr Horsley breached all or any of Rules 5.3, 6.1 and 7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules")?

2. If so, was that breach wilful or reckless, such as to constitute misconduct?

3. If not, are there such failures as to amount to negligence or incompetence; and if so, are they sufficiently serious to bring the profession into disrepute?

4. If not, is the practitioner guilty of unsatisfactory conduct by means of a simple breach of the Rules or by falling *"… short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer"*.[1]

Background

[9] The background facts are not in dispute.

[10] On 25 November 2016 Mr Horsley received instructions from MS to act for her, and her great aunt VG, then aged 92, in relation to a title transfer of the property occupied by VG and owned as to one-third by MS and two-thirds by VG.

[11] This ownership had come about when, in early 2000, the property was purchased by VG and her sister ZS together with MS, as Tenants in Common in equal shares. VG and ZS could not afford to purchase the property outright and invited their niece, MS, to contribute one-third on the basis that when they both died "full ownership of the property would automatically pass to her".

[12] Following ZS's death in 2013 her share passed to VG, resulting in VG holding a two-thirds share. It seems this caused MS some concern, as she had expected the property to pass to her.

[1] Section 12 Lawyers and Conveyancers Act 2006.

[13] Although it was not the focus of evidence at the hearing, another background factor is that VG was the trustee of a number of trusts relating to quite substantial family assets. Indeed, Mr Horsley knew of VG as a trustee of the trust which owned the premises from which his law firm operated. In other words, VG was one of his 'landlords', although he had never met her and was not aware of her age.

[14] There was a background dispute within the family and clearly this caused some real tensions between MS and her brother KS, who was VG's Attorney. MS acknowledged in evidence that she did not necessarily wish KS to be involved in the transaction under scrutiny, in respect of which Mr Horsley was instructed to act.

[15] VG had long-standing lawyers of her own, however when MS approached the relevant partner at that firm to talk about the transfer of the property, after considering the matter, he declined to act. His reasons related to the background family dispute (and therefore it would seem he anticipated some conflict of interest arising). MS was vague in her evidence when asked about the reasons for the refusal to act.

[16] Because of this, MS approached Mr Horsley, who was known to her as a tenant of one of the trust properties. MS provided Mr Horsley with a piece of paper signed by VG, dated 24 November 2016 which stated, *"I VG do give MS the full ownership of my property of X Drive, Kohimarama, Auckland".*

[17] On MS's instructions, on or about 25 November 2016 Mr Horsley's firm prepared a deed of declaration in which the title to the property was agreed to be transferred from Tenancy in Common to a Joint Tenancy. This meant that the property would pass automatically to the survivor of VG and MS. We quote from the Standards Committee opening which summarises the contents of the deed as follows:

> "(a) It was the intention of ZS, VG and MS that full ownership of the Property would automatically pass to MS when both ZS and VG died;
>
> (b) VG acknowledged that, by agreeing to the transfer in title and signing the deed, the value of her ownership share would decrease by $333,333.33, and MS's ownership share would increase in value by the same amount; and
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> (c) MS and VG wished to instruct Metro Law to transfer the title of the Property to a joint tenancy, and the title transfer was merely a correction to the title."

[18] On 29 November 2016, Mr Horsley took the deed of declaration to meet with VG and MS and discuss it. He explained to VG that the effect of the title transfer would be a reduction in the value of her share in the property. He then witnessed both signatures and an Authority and Instruction form. He made a file note that he had conducted a very detailed discussion with VG and then MS regarding the title and how the original intention is clearly set out in the declaration to be signed by VG and MS.

> "VG made it very clear that all along the intention had been that the property goes automatically to MS on VG's death. Signed all the documents and VG indicated a detailed comprehension as to her insistence that the property has always been intended to go to MS on the death of VG."

[19] Later on 29 November 2016 KS, VG's Attorney received a call from her stating that MS and a lawyer had visited her, that she had signed some documents relating to her property but she could not recall the lawyer's name nor did she have a copy of the documents. VG asked KS to obtain a copy of the documents. KS instructed his lawyers to make inquiries. When no response was received from MS's own lawyers, KS's lawyers conducted a title search on 30 November and discovered the transfer had been effected in accordance with the deed, to a Joint Tenancy.

[20] On that same day, a staff solicitor from Mr Horsley's firm had obtained VG's signature on a tax statement and statutory declaration to certify her full name in order to complete the transaction.

[21] That staff solicitor made a note to the effect that VG had fully understood the implications of signing the documentation to transfer the title into Joint Tenancy and that the solicitor was confident that she had the capacity to do so. (The solicitor had no medical evidence to support this view).

[22] VG had subsequently told KS that she wished to retain her two-thirds ownership until she died, at which time it would pass to MS.

[23] Despite requests to reverse the transaction MS has declined to do so.

[24] A complaint was made by KS as Attorney for VG to the Law Society on 9 December 2016.

[25] Following the concerns having been raised with his firm, Mr Horsley sent another staff solicitor to provide a letter of engagement because this had been overlooked at the time of the initial instructions. That letter, clearly an attempt to "paper over the cracks" stated:

> "We will act for both of you in relation to the corrections to the title [of the property]. We will do all things necessary to complete the transfer of the property from tenants in common to joint tenancy in accordance with what has always been the parties' intentions."

[26] Before referring to the particular failures alleged (some of which are accepted by the practitioner) we endorse the Standards Committee submissions that the key issues for determination are:

> "(a) Whether there was a more than negligible risk the Practitioner might be unable to discharge his obligations to VG and MS in acting for both parties in the title transfer transaction. This involves considering:
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> (i) The nature and extent of the Practitioner's retainer, in particular whether his retainer was limited to just carrying out the title transfer, and did not involve advising VG in any way beyond this; and
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> (ii) Whether there (sic) a potential conflict between VG's interests and MS's interests; and
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> (b) If the risk of a conflict between the interests of VG and MS was negligible (or less than negligible), whether the Practitioner obtained VG's prior informed consent (as defined in the Rules) to act for both her and MS in the transaction."

Risk of Conflict of Interest?

[27] Counsel traversed the leading authorities on the issue of conflicts of duty. First, in *Taylor v Schofield Peterson,*[2] in which the High Court described a conflict as arising:

> "… When the interests of two or more clients are inconsistent, or diverse. Whether something is a different flavour, and whether the flavour has become a poison, can only be determined in a particular case by the familiar techniques of close analysis of the facts, and the commonsense application of judgment."

[28] The Court of Appeal has confirmed that a practitioner cannot properly discharge his or her "duties to one whose interests are in opposition to those of another client".[3]

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[2] *Taylor v Schofield Peterson* [1999] 3 NZLR 434 at 440.
[3] *Farrington v Rowe* [1985] 1 NZLR 83 (CA) at 90.

[29] The facts in this case disclose that VG was, during her lifetime (not upon her death as earlier agreed) potentially transferring a share worth over $333,000 to her niece. As MS stated, she could have predeceased VG, in which case the position would have been reversed and VG would have stood to benefit.[4]

[30] In making this transfer VG lost the opportunity of revising her testamentary wishes. And she was also no longer the owner of a two-third share which, given at least some of her comments after the transaction appeared to be an important matter to her.

[31] MS was securing her position as to automatic acquisition of the property on the death of her aunt and, given that she is in her 50s and her aunt is 92, the scales of benefit must be seen as being in MS's favour.

[32] There was also a risk, against the background of the wider family dispute, that these parties could have fallen out prior to the death of one of them and might have wished to retain testamentary freedom.

[33] We consider that there was more than a negligible risk of conflict arising between the interests of these two parties, both of whom the practitioner was representing. We reject the submission of Mr Horsley's counsel that the agreement had already been reached by the parties and the solicitor engaged is merely implementing that agreement so that the work is "merely transactional" and the matter is "non-contentious" and a conflict less likely to exist.

[34] We also, with respect, reject the evidence provided by Mr Haynes who was called as an expert but whose affidavit was simply read without cross-examination that a competent lawyer could have concluded there was no conflict of interest and therefore it was unnecessary to advise to seek independent legal advice.

[35] The Rules do permit the practitioner to continue to act in circumstances such as these, however there must be the prior informed consent of all parties obtained.

[4] Although given that she occupied the property without any payment to MS it is unclear to what extent the benefit would be actual.

[36] We now turn to consider the failures alleged by the Standards Committee.

Failures Alleged

(a) He did not advise VG as to the limits of the retainer, in particular, that he would not be advising on the wisdom of the transaction.

(b) He did not speak to VG privately in the absence of MS or offer to do so.

(c) He did not ask VG whether she had a lawyer who normally acted for her.

(d) He did not specifically ask or ascertain any questions as to VG's capacity, or whether she had an EPA.[5]

(e) He did not question VG's financial circumstances.

(f) He did not advise VG that she would not be able to change her mind about disposition of the property in her will once it was transferred to joint ownership.

(g) He did not raise any possible conflict of interest with her arising out of him acting for both she and MS, nor explain the meaning of such conflict.

(h) He did not advise either MS or VG to obtain independent legal advice.

[37] The practitioner accepted all of the above failures except (e) to (g) which he did not consider necessary. He had simply not detected the possibility for conflict because he considered the parties to be of one mind. He did not weigh the factors which might have led to this presentation including VG's age, capacity and any question of influence over her. Since we have found potential for a conflict, we do consider all the alleged failures to have been established.

[5] We note the practitioner's evidence, however, that he did not have concerns as to capacity as she appeared to understand when the deed was explained to her and also he knew she was a trustee of a family trust with significant assets.

Other Evidence

[38] There was argument about the admissibility of medical evidence of mental state examinations undertaken by VG around the time of the transaction. We have admitted that evidence but treated it with considerable care since it was not cross-examined on and not contextualised. The examinations, as pointed out by counsel for Mr Horsley, took place during periods of hospitalisation (when VG was obviously unwell) and therefore cannot be taken at face value.

[39] As to the expert evidence provided by Mr Haynes, we did not consider this to be "substantially helpful". This is a specialist Tribunal and many of the comments made by Mr Haynes were directed towards issues which were in fact the ultimate issues to be determined by the Tribunal itself. The Tribunal would discourage expert evidence of this sort in a case where the transaction itself is readily understandable.

Issue 1

[40] It is clear from the evidence that the practitioner failed to recognise the more than negligible risk of conflict in this case and as a consequence did not take steps to obtain the informed consent of his clients to act for both of them. In this regard then we find he has breached Rule 6.1 and 6.1.1.

[41] We note in Rule 1.2 "informed consent" is defined as:

> "… Consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved."

[42] Furthermore, we note the comments made by the Legal Complaints Review Officer ("LCRO") in *Sandy v Khan*[6], when in discussing the risks involved it was said:

> "In a case such as this it would be usual to write to the client outlining the situation and in most cases to obtain a written acknowledgement of the explanation and the continued instructions. …"

[43] And later:

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[6] Sandy v Khan LCRO 181/09 (9 December 2009) at [41].

> "It is also unlikely that informed consent to act can be given if that consent is given in the presence of the other party."[7]

[44] We consider that last comment is particularly apt in this matter where there is an elderly woman and the other party, whom we have found more likely to benefit from the transaction, is a close relative and much younger. For completeness, we note that the evidence included the playing of a video which MS took of VG signing the document of 24 November 2016. This video lasts about six minutes and it took all of that time for VG to correctly record the date – which required prompting by showing her a newspaper – and to then sign the document.

[45] In addition, because the letter of engagement was not provided at the outset of the attendance, the practitioner accepted that he was not able to take reasonable steps to ensure VG understood the nature of the retainer. That constitutes a breach of Rule 7.1.

[46] The answer then to Issue 1 is "yes".

Issue 2

[47] We do not consider that the breaches were wilful or reckless such as to constitute misconduct. Mr Horsley struck us as a normally careful practitioner who was not merely ignoring a known problem but rather failing to recognise it.

[48] We consider the practitioner's actions more closely meet the test of negligence than misconduct. The failures that we find in him are as follows:

- He failed to independently assess VG's capacity. Given her age, the nature of the transactions and that she was coming to him as a new client, with a younger relative, the practitioner ought to have been much more mindful of this aspect. While he carefully recorded that his impression was that she understood what was being done, he did not, for example, ask her to summarise back anything that he had told her or check her understanding, or describe any property owned by her, or in other ways demonstrate her memory or ability to attend.

[7] See above n 6 at [42].

Certainly, best practice would suggest that medical evidence ought to be obtained for a client in these circumstances.

- He failed to recognise an obvious potential conflict and therefore failed to advise of the risks that that carried.

- That led to a failure to advise each of the clients to obtain independent advice.

- By arriving with the document prepared, he was unintentionally ambushing his elderly client. VG had little more than an hour to digest the document and no time with the practitioner **alone** to discuss it. It would have been better practice to send the letter of engagement and the draft deed of declaration in advance so that she was able to consider it and if necessary obtain advice from trusted advisors.

- He did not ascertain whether she had an existing lawyer or an enduring power of attorney. These were significant omissions.

- By failing to see at least the elderly client alone he was unable to exclude any risk that there was undue influence at play. The piece of paper dated 24 November, which had been provided to him by MS and which had led to the deed and consequent transaction, was not sufficiently questioned by him. There was no evidence that that piece of paper represented VG's independent and informed view.

- At a slightly less serious level is the sending of a staff member with the client engagement letter, which supposedly recorded the understanding of the retainer. By this time Mr Horsley knew of the EPA and he acknowledged to us that he should have told KS that he was sending out a lawyer with a letter of engagement to visit VG.

Issue 3

[49] We have considered the negligence test set out in the decision of *W*[8] and, considering an equivalent statutory provision as to negligence, the Court said:

> "We do think it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable."

The Tribunal has asked itself whether the reputation of the profession would be lowered in the eyes of the public were such failures to be tolerated, in circumstances involving a 92-year-old lady who lives alone and is presented to a practitioner by a much younger relative.

[50] The test in s 241(c) is met. However for reasons which we now set out we consider that the level of negligence is towards the lower end of the spectrum. That is because we consider that MS withheld a number of important facts when instructing Mr Horsley, such as:

- She did not tell him about the EPA held in relation to VG's property.
- She did not tell Mr Horsley that a previous lawyer had refused to act on the transaction because of the family dispute.
- She did not tell him VG's age in advance.
- She did not tell him about the family dispute in play (which might have explained the seeming urgency to carry out the work).

[51] Secondly, we accept the practitioner's evidence that he was quite careful in setting out and explaining the transaction and the document, even if we consider that VG ought to have had longer time and opportunity to contemplate this.

[52] We also note (although more relevant to penalty) that the practitioner recognised, in giving evidence, that with hindsight he would deal with the matter

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[8] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 (Full Court of the High Court) at [82].

differently and send one client for independent advice as well as asking more questions about the family situation and legal representation. He also accepted that he should have notified KS before sending a lawyer with a letter of engagement after the complaint had been lodged. And finally he noted that he should have written to both clients concerning the risk involved in the potential conflict.

[53] We note that there has been no economic loss, or at least the consequences are not as severe as in many cases, but we consider this is a matter which can be brought into account at the penalty stage.

[54] We are not distracted by the dispute in this family. The focus has been on the practitioner's actions or inactions and given that we do not need to make an actual finding about VG's capacity we have, as stated treated the medical evidence with considerable care.

[55] Finally, we find that the exception to the conflict rule cannot apply and VG cannot be said to have given informed consent when she was never seen other than in the presence of the person with the competing interest.

[56] Thus we find the negligence charge proved.

Issue 4

[57] We do not need to specifically consider unsatisfactory conduct given our finding of negligence. However, if we are incorrect in that finding we would say that the breach of the Rules found would constitute unsatisfactory conduct at the very least; and indeed the numerous failures conceded by the practitioner would tend to the view of a less competent performance than a member of the public would be entitled to expect.

Directions

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

2. Counsel for the practitioner to file submissions in response within a further 14 days.

3. Counsel to indicate to the Tribunal Case Manager whether they wish a viva voce hearing as to penalty or whether the matter can be dealt with on the papers.

DATED at AUCKLAND this 26th day of June 2018

Judge D F Clarkson
Chair