NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 27

LCDT 003/18

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**LEGAL COMPLAINTS REVIEW OFFICER** Applicant
AND	**ANDREW MacLEAN MORRISON** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Mr S Maling

Mr K Raureti

Mr B Stanaway

HEARING at Tribunals Centre, Wellington

DATE OF HEARING 30 & 31 July 2018

DATE OF DECISION 9 August 2018

COUNSEL

Mr P Collins for the applicant

Mr S Hunter and Ms I Rosic for the respondent

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

[1] The applicant has charged the respondent with two charges being:

(a) Manipulation of a document;

(b) Breach of duty to supervise and manage.

[2] Each charge alleges misconduct by the respondent pursuant to s 241(a) of the Lawyers and Conveyancers Act 2006 (the Act). There are alternative charges for each matter alleging unsatisfactory conduct (s 241(b)), or negligence or incompetence (s 241(c)).

[3] The respondent has admitted that his conduct in respect of each charge was unsatisfactory. He denies that his conduct in respect of each charge amounted to misconduct or that he was negligent or incompetent.

[4] The charges and particulars are annexed as Appendix 1.

Background

[5] The respondent acted for AB who was a successful farmer in the W. He had acted for him since October 2007. A's farming assets included two neighbouring blocks known as X and Y which since October 2007 had been settled on the B Family Trust, referred to in the papers before us as the Original Trust. In the period prior to January 2010, A's two sons were in dispute over the distribution of these assets. This culminated in his decision to form a new Trust, (the B 2010 Trust), and to create a new will. According to the respondent, it was always A's intention to give further directions as to the division between his two sons and this new Trust was formed to assist with an equitable resolution.

[6] The respondent prepared the will and trust deed as instructed. The will provided in clause 6(b) that the testator's residuary estate was to be paid to the

trustees of the B 2010 Trust. The sub clause went on to state that the B 2010 Trust was established on 10 February 2010.

[7] The B 2010 Trust deed was signed by AB as settlor and trustee on 10 February 2010. His signature is contained on page 13 of the document below paragraphs 15 and 16. The document is not dated. Space for the signatures of the two other named trustees was provided on page 14 of the document. The named trustees did not sign the document. That document was never completed or dated.

[8] The important terms of that deed (Version 1) were:

(a) There were three named trustees, the settlor and two others. Those persons did not sign the document primarily because one of those named did not wish to become a trustee;

(b) The discretionary beneficiaries included, among others, AB's sons C and D both by name and by class. The class was referred to as including "any child, grandchild or great-grandchild of the Settlor AB …".

[9] A copy of the deed was sent to the Bank of New Zealand at M, along with a $10 note, accompanied by a letter from the respondent dated 25 February 2010, so that a bank account in the name of the trust could be set up. That did not occur.

[10] The copy of the deed and $10 note were uplifted from the Bank sometime between 25 February 2010 and 29 April 2011. No evidence has been given about how that uplifting occurred.

[11] AB became disillusioned with his son D because of his perceived intransigence over the proposals made about the farm. He instructed the respondent that he required a variation of Version 1 whereby D was to be removed as a discretionary beneficiary. New trustees were decided upon. The respondent prepared a new trust deed (Version 2) which he sent to AB with an email dated 2 February 2011.

[12] That version was not signed by anyone. It provided for the removal of D as a named discretionary beneficiary. He was, however, still included in the definition of that term by class as a "child…of the settlor…".

[13] There was an additional clause 2.3 which set out the reasons why D had been excluded as a discretionary beneficiary.

[14] The execution part of Version 2 was set out on a single page for signature by all the three proposed trustees.

[15] Subsequent to 2 February 2011 Version 2 was amended and Version 3 was thereby created. That version created the following differences from Version 2:

(a) The word "child" was removed from the definition of discretionary beneficiary by class;

(b) The alignment of pages 1-13 in the two documents differed;

(c) The execution part reverted to the format of Version 1 with AB signature on page 13 and the other two intended trustees on page 14;

(d) Page 13 of Version 1 with AB signature on it was removed from Version 1 and inserted into Version 3.

[16] Version 3 was not sent to AB for signature. It was sent to the two other trustees for signature about 1 April 2011 and received back in the respondent's office on a day in the week of 11 April 2011, duly signed. It was then hand dated 10 February 2010 by the respondent.

[17] The respondent sent the original $10 note to the accountant trustee on 29 April 2011 with the request that he hold it in his trust account as "evidence of the settlement of the trust".

The case for the applicant

[18] The applicant argues that there are five factors which lead to the conclusion that the respondent's admitted conduct is raised to the level of misconduct. They are:

(a) That the removal of page 13 from Version 1 containing the signature of AB and its insertion into Version 3 required a manual and deliberate human act;

(b) The respondent was the only person along with his secretary working on the documents;

(c) The realignment of Version 3 to accommodate the signature page from Version 1 was a manual act;

(d) Removal of the word "child" from Version 3 required a manual act and a degree of legal analysis;

(e) The respondent admits that he inserted the date 10 February 2010 in Version 3.

[19] As to (a). The respondent acknowledged that the removal of page 13 from Version 1 and its insertion into Version 3 required a manual act. He said that it was an accident and that he had no idea how that act occurred.[1] He later accepted that the only persons who could have responsibility for what happened was himself or his legal secretary Ms F.[2] The applicant submitted that there was no evidence offered of muddlement or the sweeping up of loose documents.

[20] As to (b). The applicant submitted that the respondent offered no evidence to indicate that others worked on the documents. Ms F in answer to the question put to her replied that it was only her and the respondent who worked on the matter.[3]

[1] Notes of Evidence p 51, line 7 and p 71.
[2] Notes of Evidence p 71, lines 13 – 33.
[3] Notes of Evidence p 84, lines 1 – 5.

[21] As to (c). The respondent accepted that the alignment of paragraph and page numbers were wholly different between each of Version 2 and Version 3. He accepted that for a person to insert the signature page from Version 1 into Version 3, a deliberate recalibration of the document was required.[4] Ms F told the applicant that she was the person responsible for typing up the documents.

[22] As to (d). The applicant's argument is that the removal of the word "child" from Version 3 leads to the compelling conclusion that it required a manual act and a degree of legal analysis. On that matter, the respondent said that he wasn't sure who removed the word. He agreed that the word had to be removed to match the removal of D by name. He admitted that it would not be something he would expect a legally unqualified secretary to do.[5] Ms F confirmed that she would not have independently removed the word and would have, in any event, consulted the respondent about that.[6]

[23] As to (e). The respondent has admitted fixing the date of 10 February 2010 on Version 3. He did so when Version 3 was received in his office in the week commencing 11 April 2011.[7]

[24] The submission for the applicant is that the act of backdating the document was to make the document completely synchronise with clause 6(b) of the will. Had that not occurred, then there would have been the necessity to draw a codicil to the will and to draw and have signed a new deed of trust. The respondent having been equivocal about the issue later explained the backdating as happening because he had lost interest in the Bs and had moved on, thus giving the matter scant focus.[8]

[25] The key submission for the applicant is that the five factors taken together lead to misconduct that was done "wilfully with a wrong intention and conveys the idea of

[4] Notes of Evidence p 64, lines 11 – 18.
[5] Notes of Evidence p 64, lines 19 – 30.
[6] Notes of Evidence pp 87 and 88.
[7] Notes of Evidence p 65.
[8] Notes of Evidence p 66.

intentional wrongdoing".[9] The applicant submits that the conduct leads to the conclusion that it was disgraceful and dishonourable.

The case for the respondent

[26] The respondent has, from the beginning of the Standards Committee's enquiry and throughout what has followed, admitted the essential facts. He has described these as significant errors amounting to unsatisfactory conduct for which he takes responsibility. He has before the Tribunal continued to say that he has acted carelessly but not deliberately. He has described what happened as being accidental.

[27] His counsel submitted that the notion that the respondent acted falsely and deliberately is inconsistent with his 50 years of unblemished practice and senior positions in the profession. He submitted that the likely explanation is that the respondent's actions were a lapse by an overworked older practitioner near the end of his career.

Discussion

[28] Version 3 is a fraudulent document in that it was purported to have been signed by the settlor but was not so signed. It purported to have been made on 10 February 2010 but was not. The settlor did not sign it. The signatures of the other two trustees were not made until a date between 8 and 11 April 2011. The respondent thereafter personally dated the document giving it the date of 10 February 2010.

[29] The respondent admits that the document was "manipulated" by someone but says it was not him and does not know how the manipulation came about. He acknowledges dating the document.

[30] He has offered no evidence or explanation as to who carried out the manipulation or how that manipulation occurred. Reference has been made to the equivocal nature of the respondent's answers given under cross-examination.

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[9] *Pillai v Messiter* (No 2) (1989) 16 NSWLR 197, 200 (NSWCA) at 200.

[31] The evidence satisfies us that the only persons who worked on the document were the respondent and his legal secretary Ms F.

[32] We have given careful consideration to the evidence and the careful submissions of the applicant. We conclude that the respondent was responsible for the manipulations resulting in the production of Version 3 and that he did so deliberately. Thereafter he represented that document as a duly executed Deed effective from 10 February 2010. It was neither.

[33] Having made those findings we considered whether it was also proved that the respondent's conduct was dishonourable. We consider that it was and that the charge of misconduct is proved.

[34] It follows from the finding that we have made, that it is not necessary to consider Charge 2 alleging breach of duty to supervise and manage.

[35] In reaching the conclusion that the respondent's conduct was deliberate, we have not disregarded that he raised his unblemished record as indicative of his lack of culpability. Counsel for the applicant submitted that the facts of this matter are sufficiently compelling in favour of the finding of misconduct to render it unnecessary to balance those facts against a credibility consideration of the respondent arising from his unblemished record.

[36] The Tribunal accepts that submission. It is not unusual that a lawyer who has a previously unblemished record is found to have sullied that record.

[37] There was discussion during the hearing about possible motives that the respondent might have had for his actions. The possibility was raised that he acted as he did because of the advanced years and frailty of AB. The second suggestion was that the respondent could have been motivated to avoid the possibility of a negligence claim being made by CB. A third possible motive arose during the cross-

examination of the respondent where he said that he had lost interest and had moved on and away from the Bs case which had been intense.[10]

[38] We accept the submission that it is not necessary to prove a motive for the respondent's conduct. However, we incline to the view that the respondent's wish to have the matters "done with" was the motivation for what he did in fact do.

Decision

[39] The Tribunal finds that the charge of misconduct is proved. It is not necessary to consider Charge 2 of failure to manage. It is dismissed accordingly.

Directions

1. The applicant is to file submissions as to penalty within 14 days of the release of this decision.

2. The respondent is to file his submissions as to penalty within a further 14 days.

3. Counsel are to consult with the Tribunal Case Manager to allocate a date of hearing to consider penalty and to advise the duration of that hearing.

DATED at AUCKLAND this 9th day of August 2018

BJ Kendall
Chairperson

[10] Notes of Evidence p 66, lines 15-24.

Appendix 1

Charge one: manipulation of document

Misconduct pursuant to s.241(a) of the Lawyers and Conveyancers Act 2006 (the Act); or, in the alternative

Unsatisfactory conduct that was not so gross, wilful, or reckless as to amount to misconduct, pursuant to s.241(b) of the Act; or, in the further alternative

Negligence or incompetence of such degree as to reflect on his fitness to practise or as to bring his profession into disrepute, pursuant to s.241(c) of the Act.

Particulars:

1. At all relevant times the practitioner was a lawyer, practising as a barrister and solicitor on his own account as a partner in the Wellington firm EF (from late 2010, GH).
2. In or about January or early February 2010, on the instructions of his client AB (Mr B), the practitioner either prepared personally or directed another person in his firm to prepare:
   (a) A deed of trust, of which Mr B was the settlor, establishing a trust named B 2010 Trust (Trust Deed Version 1); and
   (b) A new will for Mr B.
3. The terms of the will and Trust Deed Version 1 included:
   (a) As to the will:
      (i) Except for Mr Bs' personal chattels, the entire estate was residue;
      (ii) The trustees and executors were to dispose of the net residue in the following manner [clause 6.1(b)]:

      > *"to pay the balance ('my residuary estate') to the Trustees of the B 2010 Trust (in their capacity as Trustees). The B 2010 Trust was established by me by deed dated the 10th day of February 2010."*

   (b) As to Trust Deed Version 1:
      (i) The named trustees were; Mr B, IJ, solicitor, and KL, accountant;
      (ii) The discretionary beneficiaries included Mr B sons, C and D B, and their spouses, and the Trustees of the M Trust, which was a trust associated with CB and his family;
      (iii) C and D B were included in the definition of discretionary beneficiaries both by name and by class, the latter with reference to the definition of discretionary beneficiary as including "*any child, grandchild or greatgrandchild the Settlor AB, born before the date of distribution*";
      (iv) The initial settlement was by way of $10.00 in cash and, in Introduction recital B; *"Other monies or property may be paid or transferred to or acquired by the Trustees to be held upon the same trusts as are set out in this Deed"*;
      (v) By clause 8.1, the power to appoint and remove trustees was held by the Appointor (by clause 21, being Mr B and CB); and
      (vi) By clause 8.6, *"The number of trustees at any point of time shall not be less than two"*.
4. Trust Deed Version 1 was signed by Mr B but not by either of the other two named trustees. It was not dated.

5. By letter dated 25 February 2010, the practitioner submitted Trust Deed Version 1 to the manager of the M branch of the Bank of New Zealand, accompanied by a $10 note comprising the initial trust settlement. The letter referred to Trust Deed Version 1 as the "executed Deed of Trust" although it was signed only by Mr B and was undated.

6. On or shortly before 2 February 2011 the practitioner, or others at his firm under his direction, prepared another Deed of Trust purporting to constitute the B 2010 Trust (Trust Deed Version 2) which differed materially from Trust Deed Version 1:
   (a) The Trustee IJ in Trust Deed Version 1 was removed and substituted by CB;
   (b) DB was omitted from the persons defined as discretionary beneficiaries by name (but the definition of discretionary beneficiaries by class was unchanged);
   (c) The intended omission of DB as a discretionary beneficiary was the subject of clause 2.3 which stated:

> *"Explanatory Note. The Settlor AB records he has excluded his son DB from being a Discretionary Beneficiary from this Trust for a number of reasons. These have been carefully considered, and the Settlor explains thus:*
>
> *(a) I believe that I have already fully and fairly provided for my son DB by my establishment and development of assets in the B Family Trust created by Deed on 5 November 1976 which has assets comprising two farm properties known as 'X'* (sic) *and 'Y' plus some other assets AND such Trust has substantial assets for distribution to the two beneficiaries who are my two sons CB and DB;*
>
> *(b) my son DB has generally caused me a great deal of worry and distress over many years;*
>
> *(c) my son DB has elected to pursue his own life and has not contributed or participated in my life or the family farming ventures;*
>
> *(d) my son DB has made it difficult for me (and the Trustees) to enable the acquisition of a further farm OR to facilitate distribution of the assets of the B Family Trust to my two sons AND has cost substantial time, endeavour and money;*
>
> *(e) I consider it morally and equitably fair to make added provision for my son. CB and his family because he has always loyally and practically supported me in farming and in my personal life in every way AND without expecting or gaining more than very modest remuneration.*

7. The practitioner sent Trust Deed Version 2 to Mr B, by email, on 2 February 2011. He made no mention of Trust Deed Version 2 being different from or replacing Trust Deed Version 1 but stated:

> *"**Deed of Trust for B 2010 Trust.***
>
> *This contains provision for your son C and his family but excludes D for the reasons stated, and because you feel an obligation; and is drafted to meet your needs. Your preference that your son C might acquire some further property following your reasonable view that it might be necessary for the two farms to be given to each of your two sons C and D, might be met.*
>
> *In my view it would be wise also at the same time that you enter into an agreement for sale of assets at current market value, so as to sell your current assets to the new*

Trust, and I need particulars of full description of each of those assets and the current value thereof. The Government value of G property would be desirable, and the current market value of any other assets.

The Government intends abolishing gift duty in October, and accordingly it would be appropriate to enter into a gift at the same time.

I am sending copies of these draft documents to your intended Trustee KL, and also to your son C for approval."

8. Trust Deed Version 2 was prepared by the practitioner, or others at his direction, along with a further version, Trust Deed Version 3:
   (a) Trust Deed Version 2 included the execution part in which all three intended trustees were to sign on a single page, page 14;
   (b) The execution part in Trust Deed Version 3 provided for the signatures of CB and KL on the same page (p.14) and the signature of Mr B on a separate page, p.13;
   (c) The definition of discretionary beneficiary by class, in Trust Deed Version 3, omitted the word "child"
   (d) The alignment of the numbered clauses on pages 1-13 in Trust Deed Version 2 was different from Trust Deed Version 3.
9. The practitioner falsified the execution of Trust Deed Version 3, either personally or by others at his firm acting under his direction and control:
   (a) On an unknown date, but on or soon after 2 February 2011, he entered the handwritten date 10 February 2010 on page 1;
   (b) Mr B did not sign Trust Deed Version 3. Instead, that document was manipulated by removing the page Mr B' had signed in Trust Deed Version 1 and inserting it in Trust Deed Version 3;
   (c) Trust Deed Version 3 was a separately typed document, to accommodate the insertion of page 13 from Trust Deed Version 1, in the manner described in particulars 8(b)&(d);
   (d) The removal of the word "child" from the definition of discretionary beneficiaries by class resolved an inconsistency in Trust Deed Version 2, in which DB had been removed as a discretionary beneficiary by name but not by class.
10. At an unknown time prior to the preparation of Trust Deed Versions 2 and 3, the practitioner or another person at his direction uplifted from the BNZ Bank Trust Deed Version 1 and the $10 note constituting the initial settlement and delivered it to the practitioner's office.
11. Notwithstanding the manipulation of Trust Deed Version 3 in the manner described in particular 9 above, the practitioner subsequently represented it as the conclusive deed constituting the B 2010 Trust:
   (a) On 15 May 2012, he sent a copy of Trust Deed Version 2[b] to the trustees KL and CB with a covering email stating:

> *"**B 2010 Trust***
> *We **attach** copy Deed of Trust.*
> *We note that due to AB subsequent infirmity there was no sale of assets to the Trust valued and effected"*;

   (b) Earlier, by letter dated 29 April 2011 to the trustee KL, in circumstances where he knew Mr L had signed Trust Deed Version 2[b] and believed it to be the conclusive deed, he sent the same $10 note that had been uplifted from the BNZ (described in particular 10)

with reference to "B 2010 Trust" for depositing into Mr L's trust account *"As the evidence of settlement of the Trust"*;

(c) In an affidavit he swore on 28 January 2014, in support of an application to grant probate in AB will dated 10 February 2010, he referred to and relied on Trust Deed Version 3 as the authentic and conclusive document constituting the B 2010 Trust:

(i) At paragraph 11 of that affidavit he referred to the "*note … contained in the Deed of Trust dated 10 February 2010*" which is exhibit 2 in DB affidavit. That exhibit was Trust Deed Version 3;

(ii) At paragraph 49 of the affidavit he referred to a "draft deed of the B 2010 Trust" being sent to Mr (A) B on 2 February 2010, which was a reference to Trust Deed Version 1 but that distinction was not made; and

(iii) At paragraph 66 of the affidavit he said:

> *"I have tried to be fair and honest in my consultations with Mr* [A] *B and have gone to some length, as stated, in this affidavit to try and set out why Mr B made the comments that he did at clause 2.3 of the B 2010 Trust regarding DB."*

In the context, that was a reference to Trust Deed Version 3.

12. The practitioner thereby:

(a) Either personally or by another person at his direction or under his control, manipulated Trust Deed Version 3 so that it would appear to have been signed by Mr B as a trustee when it had not; and

(b) In Court proceedings and elsewhere represented Trust Deed Version 3 as the authentic and conclusive document purporting to constitute the B 2010 Trust when it was not.

Charge two: breach of duty to supervise and manage

Misconduct pursuant to s.241(a) of the Lawyers and Conveyancers Act 2006 (the Act); or, in the alternative

Unsatisfactory conduct that was not so gross, wilful, or reckless as to amount to misconduct, pursuant to s.241(b) of the Act; or, in the further alternative

Negligence or incompetence of such degree as to reflect on his fitness to practise or as to bring his profession into disrepute, pursuant to s.241(c) of the Act.

Particulars:

1. The particulars in support of charge one are repeated.

2. To the extent that the manipulation of Trust Deed Version 3, as described in charge one particulars 8-10, was undertaken by one or more persons at the practitioner's firm other than the practitioner personally, he breached his duty to competently supervise and manage those persons, contrary to Rule 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008).