NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 15
LCDT 015/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **SARAH ASTRID SAUNDERSON-WARNER** of Dunedin, Lawyer

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr M Gough
Dr I McAndrew
Mr P Radich
Ms S Sage

DATE OF HEARING at Dunedin on 11 February 2013

APPEARANCES
Mr J Guest for the Otago Lawyers' Standards Committee
Mr F Barton and Ms A Cunninghame for the Practitioner

RESERVED DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The practitioner denies two charges of misconduct. A defended hearing was held in Dunedin on 11 February 2013. The Tribunal requested further information be supplied by the practitioner. That has now been provided along with supplementary submissions from her counsel. On that basis the decision was reserved and the Tribunal now delivers its decision and supporting reasons. The decision is reached by a majority of four members to one; the decision and reasons of the minority member are also set out in this judgment.

Charges

Charge 1

The Otago Lawyers Standards Committee charges Sarah Astrid Saunderson-Warner of Dunedin, Lawyer with misconduct under s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 ("the Act") as follows:

During December 2009, whilst providing regulated services as defined by the Lawyers and Conveyancers Act 2006 as a partner of the firm of Aspinall Joel, Sarah Astrid Saunderson-Warner engaged in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, namely:

(a) Causing an employee of the firm, namely Ms X, to make telephone contact with Dr H to terminate an existing retainer from the said Dr H and his wife Mrs H;

(b) At the time of the communication referred to in (a), the firm of Aspinall Joel had instructions from Dr and Mrs H to assist with the recovery of a debt owed to them by Mr S;

(c) The communication in (a) only occurred because about the same period of time Ms Saunderson-Warner had taken or was contemplating taking instructions to act for the said Mr S.

(d) The instructions received from the said Mr S were certain to generate more significant work and fees than any remaining work for Dr and Mrs H;

(e) The conduct set out in the preceding paragraphs was contrary to rule 4.2 of the Lawyers: Rules of Conduct and Client Care Rules.

Charge 2

In the alternative to Charge 1, the Otago Lawyers Standards Committee charges Sarah Astrid Saunderson-Warner of Dunedin, Lawyer with misconduct under s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 ("the Act") as follows:

Sarah Astrid Saunderson-Warner engaged in conduct that consisted of a wilful or reckless contravention of Rule 4.2 of the Lawyers: Rules of Conduct and Client Care Rules in that whilst providing regulated services through the firm of Aspinall Joel she directed an employee, namely Ms X, on a day during December 2009 to terminate an existing contract of retainer from Dr H and Mrs H in relation to the recovery of a debt owed to them by the said Mr S.

Background

[2] The background to these charges is that in April of 2009 an employee of the practitioner, Ms X was approached by the complainants, Dr and Mrs H, who resided in another city, to assist with the enforcement of a judgment debt. Initially this comprised attendance on an order for examination of the judgment debtor. On the first occasion the judgment debtor did not appear but on the second occasion, after a warrant had been issued, he appeared and an arrangement for payment was entered into. This arrangement was breached, following which the complainant asked the firm to apply for a distress warrant as a further enforcement method, thus extending the original terms of the retainer.

[3] It should be noted that the complainant was entirely satisfied with the services of Ms X who was attentive and diligent. She even reported back to the complainant that she was aware, at the time the distress warrant was issued, that the debtor had a BMW motor vehicle which seemed to represent the best chance of recovery of the judgment debt. The reporting letter relating to the distress warrant and commenting on the motor vehicle was 23 September 2009. This letter enclosed an invoice for attendances to that date. On 9 November the Court reported directly to the complainant that they had been unable to execute the distress warrant.

[4] On a date, which was at first wrongly stated by the complainant as 19 November 2009, but must have been in early December 2009, Ms X was leaving the office for lunch when she noted the vehicle belonging to the judgment debtor in her

firm's car park. She was perturbed. On her return from lunch she made inquiries about the owner and why the vehicle was in the car park. She was told that the owner was consulting with the practitioner Ms Saunderson-Warner.

[5] It is clear from Ms X's evidence that she regarded this as a problem. She told the office manager that she "was concerned that a debtor who was being pursued by our clients appeared to be a client of the firm, and that this was an actual or potential conflict of interest". In her affidavit she went on to say that, while she did not feel able to interrupt the client meeting, as soon as she could she spoke with Ms Saunderson-Warner about the "problem that (she) had identified". There was a discussion about the H's retainer, which is differently remembered by Ms X and Ms Saunderson-Warner. We note the passage of time has not assisted recollection.

[6] Ms X says it was made clear to her that she needed to contact the clients and inform them that the firm was no longer acting for them. She then telephoned Dr H and indicated that she would not be able to undertake any further work; but she did not tell him why or that she had seen the BMW motor vehicle in the firm's car park. That information, as later passed to Dr H by the firm's office manager, disturbed him significantly, following which he made the complaint to the Standards Committee and to the practitioner directly.

[7] While Ms X described, a number of times, the situation about the state of her retainer from Dr and Mrs H as "grey", the practitioner's version of the events of December 2009 is somewhat more black and white. It is contained in her letter to the Standards Committee, as is the firm's account of Ms X's comments:

> **C.** Ms X comments as follows:
>
> - Ms X did observe the vehicle parked near our offices on 19 November 2009.
> - Ms X then checked to see if the occupants of the vehicle were visiting the offices of Aspinall Joel.
> - It was 19 November 2009 that Ms X became aware that Mr S was attending on Ms Saunderson-Warner. Ms X immediately informed Ms Saunderson-Warner that she had previously acting (sic) for a creditor (Dr H) in relation to an order for examination and distress warrant in respect of Mr S. That file was discussed. At that time Ms Saunderson-Warner had not accepted instructions to act for Mr S. During the discussions Ms X explained that the file had been closed and the instructions

completed some time ago. It was decided that Ms Saunderson-Warner would not be in a conflict in acting for Mr S as Ms X had completed the instructions for Dr H. However it was noted that if Dr H had future work we would have to re-evaluate whether we could act for him (this would depend on what the instructions related to).

- Ms X contacted Dr H by phone on 19 November. The call on 19 November was the only phone call made to Dr H by Ms X (or vice versa) after the work was completed and the file was closed in June 2009. The observation of the vehicle in the car park or Mr S's status was not disclosed in that phone call.
- Ms X felt that as Dr and Mrs H were "out of town" clients common courtesy dictated that they should be advised of the situation that had arisen so that if they ever had further instructions in relation to Mr S they would be aware they would need to instruct another law firm if they decided to pursue the debt. At no time during that phone call did Dr H articulate any work he believed we were doing at the time or any work he wished to instruct us on in the future.

D. Ms Saunderson-Warner comments as follows:

- Mr S attended our offices on 19 November 2009.
- Shortly after Mr S departed the office, Ms X made Ms Saunderson-Warner aware of the fact that we had acted for the H's in an order for examination and obtaining a distress warrant against Mr S. The file was discussed. This discussion is set out above. At this time I had not accepted instructions to act for Mr S. A number of steps (such as a conflict check) had to be completed and further information to be obtained.
- Mr S's file was opened on 23 November 2009.
- Aspinall Joel's procedures to avoid conflict situations arising include a check against our databases of current files and previous clients. The database is held on our accounting software 'Junior Partner' and has the capacity to search both open files (a 'file search') and former clients (a 'client search'). Both searches are conducted for key names, such as witnesses or opposing parties. If it is found that we have previously acted for a party, that file will be reviewed to ascertain whether it creates a conflict situation. In this case it was brought to my attention almost immediately that we had acted against Mr S in the past. We have a peer review system, so that if a potential conflict is identified it is discussed with at least one other member of staff. We also hold regular staff meetings and are generally aware of files held by other staff members.

[8] The other background fact to be recorded is that on 19 November 2009 the practitioner's firm sent an account rendered to the complainant. This is relevant because in her letter of 24 March 2010, to the complainant, in which she maintained her approach that the work for which Dr H had instructed the firm had been finalised, Ms Saunderson-Warner went on to record:

> "We note that the invoice of 23 September 2009 for the sum of $465 remains unpaid and you have indicated that you are not going to pay this. On this basis, we are not in a position to accept instructions from you now."

[9] The practitioner relies on non-payment as a further justification for termination of the retainer between her firm and the complainant.

[10] We record that the practitioner continued to act for Mr S. This was initially intended to be on a legal aid basis but in fact ultimately was a private retainer, in which the practitioner successfully conducted an appeal. This was clearly a more involved and lengthy brief that the retainer between the firm and the complainant.

[11] Finally, we note that the mistaken date (19 November rather than a later, early-December date) has been the cause of some difficulty in this case and we respectfully agree with the comments of Mr Radich, in the dissenting portion of this decision, in that regard.

The Practitioner's Case

[12] Ms Saunderson-Warner has throughout maintained that the obtaining of a distress warrant against Mr S by her firm concluded the retainer between the firm and the complainant despite the fact that no execution of that warrant (successful or otherwise), had been reported to the firm, which in turn might have led to further advice being provided to Dr and Mrs H or further instructions being received. It is her firm position that:

> "There were no continuing instructions from the [complainant's] and that the work carried out on their file had been billed."

[13] The practitioner states that she did not tell Ms X to ring the complainants to say that the firm could no longer act but accepts that there may have been a misunderstanding whereby Ms X left the meeting thinking that this was her task to carry out.

[14] The practitioner says that there was no intention to terminate a retainer because there was no existing retainer and that any call was merely a courtesy call to inform the complainants that no future instructions could be received from them.

[15] While the practitioner accepts that the retainer was wider than that encompassed by the client engagement letter, because it had gone on to generate further work, she argues that once the distress warrant was issued and the bailiffs instructed to seize the vehicle, the firm had no further role. Indeed the practitioner goes further than that. She says that there were in fact:

> "No further steps that could have been taken by Ms X or the firm to recover the debt at this time."

[16] This position totally overlooks the possibility that Ms X could have immediately picked up the telephone on sighting the vehicle of Mr S and informed the bailiff of its location thereby facilitating seizure.

[17] The practitioner goes on to refer to the non-payment of fees by "C" relying on paragraph 5.8.2 of the text on legal ethics written by Dr Webb[1] in which it is stated:

> "Under the whole retainer principle a practitioner is not entitled to render a bill until the work is completed ... accordingly, if a client fails to pay a bill of costs which are properly rendered, a lawyer is justified in terminating the retainer."

[18] The practitioner denies terminating a small retainer for a more lucrative one. She submits that her conduct, while amounting to misunderstanding with the client, could not be regarded as disgraceful or dishonourable. Furthermore, she goes on to say that any conflict which existed did not prejudice the complainant's interests. The practitioner asserts that no loss has been suffered by the complainant as a result of her acting for Mr S.

[19] The practitioner reminds the Tribunal that she has been co-operative with the Standards Committee throughout the investigation.

Conflict in Evidence

[20] The first area of conflict is whether the BMW car belonging to Mr S was discussed in the first conversation between Ms X and Ms Saunderson-Warner.

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[1] *Lawyers Professional Responsibilities*, 3rd ed.

[21] In her evidence Ms X's focus, when she went to speak to Ms Saunderson-Warner was clearly the BMW car which she had spotted. Her evidence under cross examination by Mr Barton was:

> "I don't remember the exact words that we talked about because it's so long ago, it's almost coming up ... a long time, but I, I know I told her that the car was the subject of a distress warrant and that would be the logical conclusion, because that's what I had gone in to tell her."

[22] The second area of divergence in the evidence between the two witnesses goes to the heart of the matter. The passage of evidence where Ms X is being cross examined by Mr Barton further:

> "Q: And you told her that there was no ongoing work that you were undertaking for the H's's at that point?
>
> A: Well, it's a bit of a grey area because I didn't have anything active on my desk but I'd sent them a bill. I wasn't awaiting any dates or didn't have any events in my diary. ...
>
> Q: And Ms Saunderson-Warner in her affidavit says she asked you if there were any current instructions from the H's, and that you said no; is that correct?
>
> A: If those were her words. I can't recall what I said so, I can't recall the exact words but it wouldn't be, it wouldn't be a bad way to I guess, phrase a question from her point of view; is there anything that you are doing right now? There was not anything that I was doing right there and then on that file.
>
> Q: And for you to have done anything more on the file you would have needed fresh instructions from the clients, wouldn't you?
>
> A: Yes that's correct.
>
> Q: Now as a result of this discussion you had with Ms Saunderson-Warner, you were not in a position to accept any further instructions from the H's, were you?
>
> A: Well, how could I? The whole basis of the issue was resolving the debt recovery in terms of the distress warrant with Mr S's residential address. ... I was stuck, what could I do? ...
>
> Q: As a result of that discussion the firm could not accept future instructions?
>
> A: No.
>
> Q: So, are you agreeing with me or -

> A: Well - well, sorry, there's no way that I could have progressed that file in any way, shape or form from that point on."

[23] Later when asked about her telephone discussion with the H's the same day Ms X said:

> "A: Well, I recall telling them that I couldn't assist them, I couldn't help them anymore. I wouldn't - I can't say the exact words that I said to Dr H but I indicated that I couldn't essentially assist them to recover their debt.
>
> Q: So, was it to the effect that you could not accept any future instructions from them?
>
> A: I guess that's a way you could phrase it."

[24] In re-examination the following exchange occurred:

> "Q: But for your conversation with Ms Saunderson-Warner that day, would you have been available to take those steps on behalf of Dr H and Mrs H? (relating to further steps which could be taken).
>
> A: Well, do you mean if none of it had happened would I have been able to continue?
>
> Q: That's the question, yes.
>
> A: Of course."

[25] In answer to a question by the Chair Ms X confirmed that she had felt "awkward" about making the telephone call to the Hr's telling them that she could no longer act. Further she was asked to comment on the fact that Ms Saunderson-Warner had denied telling Ms X to telephone Dr and Mrs H. Ms X's answer was :

> "Well I wouldn't think of any other reason why I would."

[26] Ms X also confirmed in answer to a question from the Chair that she had told Ms Saunderson-Warner that she was trying to seize the very BMW that was in the office car park. In answer to a question about the completion of the retainer by Tribunal member Ms Sage, Ms X had this to say:

> "A: Well I had taken it as far as I could but at the same time for me personally seeing the client get what they were after, I hadn't - there was more that, I guess, one could do. You probably could take it to the ends of the earth but whether or not it's feasible. So, I guess in some ways you would say yes you had a result, but in some ways you would say no. You would also say no, it's quite a grey area."

[27] Ms Sage pointed to the two letters to the Law Society of June and August 2010 which had been countersigned by Ms X and in particular, pointed Ms X to the sentence that read:

> "Ms X regarded the file complete."

[28] In answer to the question as to whether she was happy with that sentence Ms X said:

> "A: Well, that's what I said, it's a grey area. In some ways it's complete, I have done A, B and C but in terms of the end result being achieved, I guess it's a matter of interpretation. I don't know to say that it was - hmm."

[29] And later:

> "... I guess it's up to Dr H in terms of whether or not he wishes to go any further."

[30] Ms Saunderson-Warner has throughout heavily relied on the fact that Ms X countersigned the letters which confirmed she had regarded this file as being completed. When asked about the circumstances of the drafting of those letters and any pressure which might have been put on her Ms X had this to say:

> "A: I would say there would be a little bit of pressure put on me, not necessarily saying it would be outward or untoward pressure, it may just be me internalising something as a junior solicitor. ... But maybe that's my view, like my interpretation or a certain way that something's phrased that I would say, well, I would rewrite it. I don't believe I had the option to rewrite the letter and I don't recall drafting it. ... But if there was any pressure I can't say it was directly from her but at the same time, do you have any choice?"

[31] The evidence of the practitioner was somewhat different in respect of both of these areas of evidence. Dealing with the second matter first, Ms Saunderson-Warner referred to the drafting of the letters to the Law Society indicating that the first draft had been carried out by Ms X, emailed to her, edited, discussed and signed. She did not provide a trail of documents to evidence the nature of any changes which had been made. She stated that Ms X had not indicated that she was uncomfortable with any of the edits.

[32] At the conclusion of the hearing the Tribunal directed that the email trail annexing the draft letters to the Law Society be provided by the practitioner and this

was done in terms of supplementary material provided to the Tribunal on 18 February.

[33] That email trail disclosed that the eventual statement attributed to Ms X of:

> "... During the discussions Ms X explained that the file had been closed and the instructions completed some time ago. It was decided that Ms Saunderson-Warner would not be in conflict acting for Mr S as Ms X had completed the instructions for Dr H."

did not appear in Ms X's first draft, but rather, after amendments were made by Ms Saunderson-Warner. While it is accurate that Ms X countersigned this document she acknowledged, in questioning by the Tribunal that "*I wouldn't have used those words*". As she pointed out that she was a junior so felt some obligation to sign, although no overt pressure was placed upon her.

[34] Ms X's evidence confirmed that she was unclear how to proceed when she saw Mr S's car and that is why she went to Ms Saunderson-Warner. Ms X saw that there was a problem and that stance simply does not fit with the tone or wording of the letter to the Standards Committee which baldly states that the file was closed and *"... the instructions completed sometime ago*". Furthermore Ms X acknowledged to the Tribunal that if Ms Saunderson-Warner had not been acting for Mr S then she *"... could have got a good result for the client".*

[35] Returning to the first dispute in the evidence, which was whether the car in the car park had been the focus of the conversation between Ms X and Ms Saunderson-Warner, under cross-examination Ms Saunderson-Warner denied that this was a focus at all:

> "I don't recall a focus on the BMW at all.
>
> Q: Did she tell you that she recognised the car that was in the car park?
>
> A: I wasn't - I don't think I was aware of that at that time. That has certainly come up later but it wasn't that the focus of the conversation mentioned was, I've seen the car that another of our clients has got a warrant for in the car park, I don't know what to do, I'm uncomfortable about it. That wasn't the topic of conversation. The conversation was about, I've acted for these people in relation to a debt by Mr S, what are you seeing Mr S about?"

[36] This evidence is in stark contrast with Ms X's recollection and seems to us to be inherently improbable. Mr Guest attempted to enquire further into this area of the practitioner's evidence by asking:

> "Q: Did you inquire as to why she would make the inquiry with you? What triggered it?
>
> A: I don't recall, no.
>
> Q: Wouldn't you be interested as to why she came into your office to ask who you were seeing or you had seen that morning; wouldn't you say, why?
>
> A: No, because we all share a calendar on Outlook so you can see other people's appointments and it maybe that you saw, you know, you see a name that's familiar and you go in and say, are you seeing this person, did you know that I've acted in a debt matter.
>
> Q: Did she tell you that there was an outstanding distress warrant against Mr S?
>
> A: She certainly told me she had applied for a distress warrant and the issue was more about, has that been done in terms of the work being done and it billed ...
>
> Q: Weren't you then in a situation, though of having a client who could have, while you were looking for him, his car seized by a distress warrant issued by your firm?
>
> A: Well, I wasn't aware that it was still active.
>
> Q: Did you inquire?
>
> A: I don't think I did and I don't know when they expire ...
>
> Q: It warranted an inquiry didn't it?
>
> A: Well, I wasn't aware of the issue about this car ..."

[37] The majority was unimpressed by the degree of sophistry employed by the practitioner in this line of questioning. We consider it showed very poor judgment. Ms Saunderson-Warner was evasive when pressed on the issue of a distress warrant having been issued, suggesting that the firm had merely "assisted in the drafting" of the distress warrant application. Ms Saunderson-Warner went on to confirm that she had not told Mr S of the distress warrant having been applied for by the firm until the complaint was laid in March.

[38] We prefer the evidence of Ms X where it differs from that of Ms Saunderson-Warner particularly in relation to the discussion during their meeting. We consider it inherently unlikely that Ms X who was agitated, having seen the very BMW motor vehicle in respect of which she sought seizure, would not mention this to her employer while outlining the reason for her perception of a problem.

Did a conflict exist? Majority decision

[39] We consider there was a failure in the firm's actions towards its clients Dr H and his wife. We consider the non-reporting either to the client or bailiff of the sighting of the car in the office car park was a dereliction of the firm's duties, given the previous focus on that asset on his behalf. Thus, there was an immediate consequence of acting for Mr S which constituted a conflict. Dr H lost the opportunity of a seizure of an asset and Mr S may well have benefited from this failure. While actual seizure of the assets is not a lawyer's role, cooperation with the authorities and enforcement of a judgment, particularly on behalf of a client is part of a lawyer's role. Indeed the "fundamental obligations of lawyers" are dominant in the way the legislation (Lawyers and Conveyancers Act 2006, "LCA") is drafted, appearing in s 4 immediately after the purposes section of the Act. These obligations include:

> "**4 Fundamental obligations of lawyers**
>
> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
>
> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
>
> (b) the obligation to be independent in providing regulated services to his or her clients:
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
>
> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[40] We consider that, as soon as she was advised by Ms X of the firm's actions against her client Mr S, that Ms Saunderson-Warner had a conflict of interest which required immediate resolution.

[41] Proper resolution would have been to disclose the conflict to both clients and invite both clients to obtain fresh representation.

[42] We reject the suggestion of the practitioner that the sending of an account was evidence of the retainer having been completed. The Terms of Engagement of the firm, signed by the complainant, include the following statement: *"We will invoice you **usually** on completion of the matter, **or on termination of our engagement**. We may also invoice you when we incur a significant disbursement/expense on your behalf. **On matters estimated to take over two months to resolve, we may send you periodic interim invoices**"* [emphasis added]. The complainant's matter had continued for more than two months – thus, he was entitled, on the basis of the terms provided to him, to interpret the receipt of an invoice as an interim invoice.

[43] That leads to consideration of the next question as to whether the charge of misconduct has been proved.

[44] The issues as set out by the Standards Committee are as follows:

[a] Did the firm ... have a current retainer from Dr and Mrs H through to the relevant events in December 2009?

[b] Did Ms Saunderson-Warner cause her employee Ms X to terminate that retainer?

[c] If so was that action motivated by Ms Saunderson-Warner's wish to act for the "other party" in the H's file?

[45] The majority finds in respect of these issues:

[a] There was a reasonable expectation on behalf of Dr and Mrs H that they were still represented by the firm and could seek further advice from the firm in the event that the execution of the distress warrant was not successful.

[b] Yes. We consider that Ms Saunderson-Warner did cause Ms X to terminate the retainer by choosing to interpret the retainer as having

ended in a manner which was self-serving, thus enabling her to act for the client with a more interesting and extensive brief.

[c] Whilst this might not be established to have been a conscious wish on Ms Saunderson-Warner's part we consider she did effectively choose the brief offered by Mr S and that this motivated her behaviour. Such motivations when there is a conflict of interest are not always obvious to the practitioner. This is one of the reasons for a particularly strict interpretation and self-regulation on the part of practitioners about acting for clients whose interests may diverge. The impact on a practitioner's judgment in this situation is significant and may well be underrated by many practitioners. It is undoubtedly the reason for the strict rules surrounding representation in conflict situations.

Does the practitioner's default amount to misconduct? Majority decision.

[46] The two charges are framed in the alternative that either the conduct found would "*reasonably be regarded by lawyers of good standing as disgraceful or dishonourable*" or that it "*consisted of a wilful or reckless contravention of Rule 4.2 of the Lawyers: Rules of Conduct and Client Care Rules*".

[47] The majority of the tribunal agrees with the submissions of Mr Guest that the nature and content of a retainer ought not to be narrowly construed given the public protective nature of the legislation governing the relationship between lawyer and client. We also accept the submission that any ambiguities are to be construed against a practitioner. The evidence of Dr H clearly demonstrated that understanding of such words as "retainer" or "contract" is not precise.

[48] The authorities suggest that precise definition of "misconduct" is not helpful, but that need not involve intentional wrongdoing. It can also include

> "a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a (*medical)* practitioner . ."[2]

[2] Pillai v Messiter (No 2) (1989) 16 NSWLR 197 at p 200 per Kirby P: as discussed in Complaints Committee No 1 of ADLS v C 3 [NZLR] 105.

[49] Whilst the majority considers the practitioner's actions lacked integrity and honest self-appraisal, we do not consider that they go so far as to be disgraceful or dishonourable. Furthermore, we do not consider her breach of Rule 4.2 to have been flagrant or reckless rather, we consider she persuaded herself that she had circumvented Rule 4.2 by her analysis of the breadth of the retainer from Dr and Mrs H and her assertion that it was completed.

[50] We do however find the conduct to be "unsatisfactory" as defined by s 12 of the Act namely:

> "(a) ... conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
>
> (b) ... conduct that would be regarded by lawyers of good standing as being unacceptable including ...
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act ..."

[51] We consider that we are entitled to substitute a lesser charge for the charge of misconduct and find unsatisfactory conduct accordingly.

Reasons for Dissent of Tribunal Member P J Radich

[52] For reasons which I will endeavour to express, I respectfully disagree with the views of the other members of this Tribunal.

Charges

[53] The charges against the practitioner are in the alternative. Each of them alleges misconduct. The first charge alleges that the practitioner's conduct was such as to be regarded by lawyers of good standing as disgraceful or dishonourable. The alternative charge is that the practitioner acted in a wilful or reckless contravention of one of the Rules. A finding of misconduct at this level ordinarily raises the question of whether a practitioner should be allowed to continue in practice or should be struck

off or suspended. These are therefore very serious charges and have been brought by the Otago Lawyers Standards Committee as serious charges.

[54] The essence of Charge 1 is that the practitioner as a principal of her firm caused a staff solicitor to terminate an existing retainer which the firm held from Dr and Mrs H. It is alleged that she did this because she wanted to act or continue to act for one Mr S who had asked her to act for him in relation to a criminal appeal which he was wishing to pursue in the High Court. It is alleged that the practitioner's motivation was a desire to take a more lucrative job.

[55] The essence of Charge 2 is that the practitioner directed her staff solicitor to terminate an existing retainer from Dr and Mrs H in wilful or reckless contravention of Rule 4.2 of the Rules.

[56] Rule 4.2 requires a lawyer who has been retained by a client to complete the provision of services unless the lawyer is discharged from the engagement by the client, the lawyer and the client have agreed that the lawyer is no longer to act or the lawyer has good cause for termination and specifies the grounds for termination. *Good cause* is defined to include various things. Plainly, the arising of a conflict of interests would be good cause.

Summary of Facts

[57] Dr and Mrs H who live at P bought a vacuum cleaner on Trade Me from Mr S in Dunedin. They considered the vacuum cleaner to be faulty and tried to get some redress from Mr S. Not having had success they went to the Disputes Tribunal in Wellington and Mr S was ordered to pay them $514.00. He did not pay. Dr and Mrs H then set about recovering the money. They went to a Community Law Centre and, acting for themselves, made an application for Mr S to be examined as a Judgment Debtor in Dunedin where Mr S lived. Not being able to conduct the examination themselves and on the advice of Community Law they looked for a Dunedin lawyer and found Aspinall Joel who agreed to act for them. A then Staff Solicitor sent a letter of engagement identifying the work as being representation in the Dunedin District Court on an Order for Examination. This Staff Solicitor left and another Ms X joined the firm and took this file over as one of her first jobs as a lawyer. Ms X went

to the District Court on 13 May 2009 for a short hearing where Mr S was present. He was required to provide further information and the hearing was adjourned to 17 June 2009. Ms X again went to Court on 17 June 2009 but Mr S did not appear. Ms X wrote to Dr H on 23 June 2009 suggesting the issue of a distress warrant and other possibilities. She said that Aspinall Joel could not go further with an Application for a distress warrant without specific instructions and authority which in due course Dr H gave. Ms X prepared the papers and these were sent to Dr H to file in the Court in Wellington. He paid the filing fee. Ms X was targeting a BMW motorcar which Mr S had disclosed at the first examination was owned by him.

[58] On 23 September 2009 Ms X wrote an important letter to Dr and Mrs H. It was headed *Order for Examination – Mr S*. Ms X advised that Mr S was due for sentence in the Dunedin District Court on 25 September 2009, that the Bailiffs were aware of this and that they were going to seize the vehicle if they could. She gave Dr and Mrs H other helpful advice and invited them to contact the firm if they had any further questions. A fee invoice in relation to the Orders for Examination and the distress warrant was enclosed. The fee was a modest $400.00 and with GST and disbursements totalled $465.00. On 15 October 2009 Dr and Mrs H left to go overseas. Dr and Mrs H received the fee invoice before leaving but it was not paid. On 9 November 2009 the Dunedin Court wrote to Dr H advising him that the Warrant could not be executed because Mr S could not be found. The Court invited Dr H to locate Mr S or otherwise contact the Court about other enforcement actions. Dr H did not go back to Aspinall Joel but, on his return from overseas in early December 2009, made inquiries himself and endeavoured to locate Mr S.

[59] On 19 November 2009 Mr S consulted the practitioner for the first time in relation to an appeal against his criminal conviction. It now turns out that he was previously a client of the firm on unrelated matters. At some point in early December 2009 Ms X looked out of her office window and saw Mr S's car in the carpark. It was this that led her to have discussions with the practitioner. I am satisfied that these discussions were quickly followed by Ms X telephoning Dr H and saying to him that Aspinall Joel would not be able to act for him in the future in relation to Mr S. This discussion must have been after Dr H returned from overseas in early December. Some time later Dr H telephoned Aspinall Joel and stated that he was not going to

pay the outstanding account because the firm was not prepared to act for him further. The account has never been paid and the debt has been written off.

Analysis

[60] These charges and the proceedings which led to their being laid have been hampered and confused by lack of clarity over exactly what happened and when it happened. A crucial component of the evidence is the telephone call which was made by Ms X to the complainants. Somehow, early in the complaints process this telephone call was said to have been made on 19 November 2009. It is now apparent that this call could not have been made then (the complainants were overseas at this time) and must have been made sometime in early December. This wrong date, initially given by the complainants, has ended up contaminating the process. It contaminated the requests made to the practitioner for an explanation and it contaminated the responses which the practitioner gave. It contaminated the approach which the Standards Committee took to the complaint. Ultimately, when Counsel was instructed by the Standards Committee to prepare the present charges, the mistake was recognised and the charges proceeded on the basis that the telephone call must have been made in early December. I will return to some of the problems with this wrong date later.

[61] Mr S's first visit to Aspinall Joel about the criminal appeal was on Thursday 19 November 2009. A file was opened on Monday 23 November 2009 and this indicates that the practitioner had by then at the latest, accepted instructions. It is unclear what checks for conflicts of interest were undertaken.

[62] If, as appears to be the case, Ms X called Dr H on the day when she saw the car in the office car park or shortly afterwards then, by that time, the practitioner had accepted instructions from Mr S and was working on his appeal unaware of any conflict issue.

[63] It is my opinion that by the time Ms X saw Mr S's car in the office car park in early December, Aspinall Joel had no active instructions from Dr and Mrs H. They had been asked to act on the examination of the Judgment Debtor and had done so. They had been asked to apply for a distress warrant and they had done so. They

had invoiced for both of these matters. They had invited Dr and Mrs H to come back to them with any further questions or instructions but no further instructions were received.

[64] The Standards Committee has taken the position that the firm had a continuing obligation to act for Dr and Mrs H in relation to the recovery of their debt. I do not see this to be so. To me these were instructions which came in segments. The first instruction was given and was acted upon. The second instruction was requested and was given and was acted upon. No third instruction was given. Perhaps a useful question is to ask whether if the staff solicitor had carried on doing further work directed at recovering the debt but without instructions to do it, would Dr and Mrs H have been liable for fees incurred after the invoice of 23 September 2009 was issued. I think not.

[65] The proper question, it seems to me, is whether after 23 September 2009 the firm had an obligation to keep itself available to receive further instructions from Dr and Mrs H and if so was that obligation breached. I think that the answer to that question depends on the extent of the obligation that was secured by Dr and Mrs H. As I have endeavoured to say previously, I think that the firm has given limited tasks and accepted the obligation to undertake these limited tasks. It is significant to me that the Letter of Engagement referred to the specific first task only. When a further task was being contemplated, specific authority to undertake this was sought and obtained.

[66] I consider that what happened here is that Dr H was, understandably, trying to recover the debt himself. This small debt did not justify the incurring of any significant legal costs. When the distress warrant was issued, Dr H resumed acting for himself. If he had ongoing expectations from the firm I would have expected him to have gone back to the firm after receiving the Court's letter of 9 November 2009 instead of proceeding to deal with the matter himself. From the firm's perspective I expect that this would have been seen as what practising lawyers call an *agency instruction* to perform limited tasks but not to take responsibility for the whole matter under a general retainer.

[67] If I am wrong in my conclusion that the firm had no continuing obligation to act generally until the debt was recovered, I do not consider that what happened, in the circumstances, amounts to a breach of professional obligations. Sometimes things go wrong, unexpected events occur and clients may end up disappointed and justifiably disappointed. That, however, does not necessarily mean that professional obligations have been breached.

[68] When Mr S first visited the firm on 19 November 2009 for the purposes of a criminal appeal the practitioner did not identify any conflict. I find this understandable. Conflict issues rarely arise out of criminal instructions. The direct contest in criminal matters is between the prosecuting authority and the person being prosecuted. Conflicts involving the person being prosecuted and other citizens usually arise peripherally and only rarely.

[69] When she became aware of the situation, the practitioner was in a position where the firm had active instructions from Mr S and had accepted these. It must be the case that the instructions were well advanced because Mr S's appeal to the High Court was filed on 10 December 2009. It seems to me that at that stage, the firm that completed the specified work for Dr and Mrs H in relation to Mr S. The most that can be said, and Counsel for the Standards Committee accepted this when the question was put to him[3], is that the firm had an obligation to accept any further instructions which Dr and Mrs H may give on that debt collection matter. In the circumstances that unfolded, I do not think that there was such an obligation.

[70] The practitioner was in a position of having to deal with a very unusual situation. She was faced with having to address and deal with some challenging ethical questions. For example:

- What freedom did Aspinall Joel have to disclose to the Bailiff or Dr and Mrs H the presence of Mr S's car in the office car park.

- Was Mr S entitled to confidentiality at the point when he made his first visit and before instructions were accepted.

[3] Page 83 transcript.

- Were Dr and Mrs H entitled to know that Mr S was a client and if so, in relation to what matter.

- Once Mr S had become a client on the new matter and had given information about his means to the firm (in the context of a Legal Aid application) could the firm have ever acted for Dr and Mrs H against Mr S as a debt collection matter.

- Could Aspinall Joel continue to act for Mr S on matters unrelated to Dr and Mrs H if no further work was being done for Dr and Mrs H.

[71] The practitioner saw such work as her firm had been instructed to do as having been completed and elected to take the position that the firm would not be able to accept future instructions from Dr and Mrs H in relation to Mr S were they to give such instructions. An alternative was to decline to act any further for either Dr and Mrs H or Mr S. Another alternative would have been to send Mr S away. In relation to declining to act any further for Mr S, the practitioner would have been required to have regard to the same Rule 4 of the Rules which of course starts off by saying –

> A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyers' fields of practice.

[72] What happened here was that some judgment calls had to be made. Different lawyers may have dealt with the situation differently. Some may have sent Dr and Mrs H and Mr S away. Some might have sent Mr S away and some might have done what the practitioner did. In my view, the practitioner did not act in a way that amounted to a breach of professional duties and did not act in a way that would be regarded by lawyers of good standing as being disgraceful or dishonourable or in a way that was a wilful or reckless contravention of the Rules.

[73] The Standards Committee has approached this prosecution on the basis that the conduct of the practitioner was egregious. That is indicated by the very high level at which the charges have been pitched. It is also indicated by the assertion in Charge 1 that the motivation of the practitioner was that the instructions from Mr S

...*were certain to generate more significant work and fees than any remaining work for Dr and Mrs H*[4].

[74] The approach and attitude of the Standards Committee is also indicated by a question put by its Counsel to the practitioner which was...

> *It's what many of us here might call a juicy file.*

[75] The Standards Committee acknowledges that it has no evidence that the practitioner was driven by a desire to achieve a better financial outcome for the firm. We have been asked to draw an inference that this is so. I am not prepared to draw any such inference as I think that explanations other than economic motivation are available. A simple and available explanation is that the practitioner honestly thought that the duties which Dr and Mrs H had given the firm had been completed and thought that in any event, having assumed important responsibilities for Mr S, she was obliged to continue with them.

[76] In the course of the hearing there was some focus on whether the explanatory letters put forward by the practitioner following the complaint of Dr and Mrs H to the Lawyers Complaints Service were truthful and generally correct. Questions arose as to who had drafted these letters and whether the staff solicitor was a willing participant in the signing of the letters which she signed. Further questions arose about the date of the discussion between the practitioner and the staff solicitor. It seems to me that the practitioner, having been told that Dr H was telephoned by the staff solicitor on or about 19 November 2009 has reconstructed events in her mind around this wrong date. She then struggled to adjust her mental reconstruction of events around a later date. I could not conclude that this was dishonesty or evasiveness. In my opinion, the explanations of the practitioner were satisfactory. In relation to the letters they were largely confirmed by material later put before us. In judging the responses of the practitioner I took into account that she was referring to events of more than two years earlier, that she was plainly stressed by her situation before the Tribunal and that these issues were put to her without any prior warning. I also took into account the effects of the mistaken date.

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[4] It is to be noted that the charge refers to *any remaining work* for Dr and Mrs H rather than *the remaining work.*

[77] In any event however, I see the function of this Tribunal as being to consider the charges and not to allow incidental matters such as the explanatory letters and what we think of the practitioner's explanations about them to determine our view of the charges themselves. The charges themselves must be supported by evidence. I do not consider that questions of how the practitioner responded to the Lawyers Complaints Service should be used to bolster inadequate evidence relating directly to the charges. If the Standards Committee considers that the practitioner has misled the Lawyers Complaints Service then that should have been the subject of a separate charge and still could be.

Overview

[78] Daily life in a law firm can throw up a multitude of different situations for practitioners to address and deal with. Some of these are predictable but others cannot be foreseen and judgment calls have to be made. I think that the judgment calls made by the practitioner under the pressures of life in a firm were judgment calls of a kind which a diligent practitioner could make and which cannot be said to amount to professional misconduct. I would dismiss both charges and would not hold any substituted charge to have been established.

Substitution of Lesser Charge

[79] The Tribunal has provided the opportunity to the parties, following the conclusion of the hearing, to make submissions on the substitution of a lesser charge. Both counsel have now done so.

[80] The Standards Committee sought amendment of the charges to allow a finding of unsatisfactory conduct to occur. For the practitioner, Mr Barton submitted that Charge 1 ought to be dismissed, if the Tribunal found that the conduct was not disgraceful or dishonourable. He conceded that were Charge 2 to be amended to delete the words "wilful or reckless", that a finding of unsatisfactory conduct could be made out.

[81] We consider that where the elements of a lesser offence are made out, the Tribunal has the jurisdiction, in terms of s 252 to enter a finding on that lesser charge,

provided that the principles of Natural Justice have been observed. In the event that we are incorrect on this point, we give leave to amend the wording of Charge 2 to delete “wilful or reckless”, and on this basis find the charge proven.

[82] The result is that we dismiss Charge 1 and make a finding of “unsatisfactory conduct” on Charge 2.

Penalty

[83] The Standards Committee is to make submissions as to penalty within 14 days of the release of this decision. The practitioner is to respond to those submissions within a further 10 days or not less than five days prior to the penalty hearing which is to be convened as soon as possible.

DATED at AUCKLAND this 24th day of April 2013

Judge D F Clarkson
Chair