NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 26

LCDT 045/14

BETWEEN **AUCKLAND STANDARDS COMMITTEE 3 of THE NEW ZEALAND LAW SOCIETY**

Applicant

AND **RDM**

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms J Gray

Mr G McKenzie

Ms C Rowe

Mr W Smith

HEARING at Specialist Courts and Tribunals Centre, Chorus House, Auckland

DATE 6 and 7 July 2015

DATE OF DECISION 13 August 2015

COUNSEL

Mr M Hodge for the Committee

Mr J Watson for the Respondent

REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGES, PENALTY AND NON-PUBLICATION OF NAME

[1] The practitioner faced three charges which relate to his conduct between March 2003 and March 2010 during which time he acted as the solicitor for the widow of EPF who died in March 2003. She was a beneficiary under her late husband's will which appointed New Zealand Guardian Trust as executor and trustee of the estate.

[2] **Charge One** alleges misconduct in the practitioner's professional capacity and is laid under s 112(1)(a) of the Law Practitioner's Act 1982 ("the 1982 Act"). There is an alternative charge of negligence or incompetence in a professional capacity together with a further alternative charge of conduct unbecoming of a barrister or solicitor.[1]

[3] This charge relates to the alleged failure by the practitioner to correct a misapprehension by the Guardian Trust about funds in the estate of EPF.

[4] **Charge Two** alleges misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 ("the Act") (disgraceful or dishonourable) and/or wilful or reckless breach of s 4(a) of the Act and/or of r 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. There is an alternative charge of negligence or incompetence in a professional capacity within the meaning of s 241 of the Act and a further alternative charge of unsatisfactory conduct within the meaning of s 12(a)-(c) of the Act.

[5] This charge alleges misleading conduct by the practitioner on behalf of the widow whereby he prepared and sent documents to Westpac which led that bank to

[1] Section 112(1)(b) and (c) of the 1982 Act.

release funds to the widow which were in the sole name of the deceased and therefore payable to the executor of the estate.

[6] **Charge Three** alleges misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Act. As with charges one and two there are alternative charges of negligence or incompetence or of unsatisfactory conduct.

[7] This charge relates to the practitioner's conduct in deducting fees owed to him by his client, (the widow), from funds properly due to the estate prior to forwarding those funds to the nominated trust account of a new solicitor instructed by the widow.

[8] The practitioner has denied all the charges.

[9] The Tribunal heard the charges on 6 and 7 July 2015. At the conclusion of the hearing and after hearing submissions from counsel for the applicant and the practitioner, the Tribunal retired to consider the matter. It returned and informed the parties that it had decided to dismiss charges one and two. It found the practitioner guilty of unsatisfactory conduct in respect of charge three.

[10] It then heard further submissions in respect of penalty and then imposed a penalty on the practitioner whereby he was ordered to pay $10,000.00 towards the costs of the Law Society and was ordered to make a refund of the costs of the Tribunal not to exceed $8,000.00.

[11] This decision contains the reasons for dismissing charges one and two, for finding him guilty of unsatisfactory conduct (charge three) and for the penalty imposed.

Background

[12] EPF died in March 2003. He was survived by his widow, two children of that marriage and by a number of children by former marriages. His estate as known at the time of death was small. It consisted of a modest home in his sole name. There was little else. There was advice from the widow that there was a term deposit with Westpac held jointly with her. The funds from that account passed to her by

survivorship. The will left the widow as a life tenant of the home. After her death the home was to be transferred to the two children of the marriage contingent upon them attaining 24 years of age. The will made provision for specific legacies to some of the children of EPF (the stepchildren) and then directed the division of the residue between the widow, her children and some of the stepchildren in unequal shares.

[13] It immediately became clear to Guardian Trust that administration of the estate would not be straightforward. There was little or no money to meet executorship charges and ongoing management fees regarding the life tenancy. Guardian Trust initiated correspondence and discussion about renouncing its right to probate and administration of the will. It eventually did so on 13 July 2004.

[14] Letters of Administration with the Will Annexed were eventually granted on 11 July 2013 to CEF, the youngest son of EPF and the widow.

The Practitioner's Role

[15] The widow consulted the practitioner very soon after the death of her husband. She received advice about her life tenancy and about making a claim to the estate under the Property (Relationships) Act 1976. The practitioner engaged in correspondence with Guardian Trust about possible options for administration of the estate if it were to renounce its executorship. He encouraged it to renounce in favour of the widow and a friend of the deceased. The Guardian Trust did renounce its executorship on 13 July 2004. It is not clear whether it took any steps to arrange for a person or persons to accept administration of the estate.

[16] On 18 February 2004, the practitioner learnt from the widow that the deceased had at the time of his death a term deposit in his sole name with Westpac Sydney. The sum was $A45,000.00. What the practitioner did about that sum and accumulated interest is central to the charges that have been made against him.

Charge One

[17] This charge alleges misconduct in the practitioner's professional capacity, pursuant to s 112(1)(a) of the 1982 Act, or in the alternative a charge of negligence or incompetence in a professional capacity pursuant to s 112(1)(c) of the 1982 Act, or in the further alternative a charge of conduct unbecoming a barrister or solicitor pursuant to s 112(1)(b) of the 1982 Act for failing to correct a misapprehension on the part of Guardian Trust about the funds in the estate of EPF.

[18] The Committee alleged that the practitioner, in acting for the widow of EPF, failed to correct statements that he had made to the Guardian Trust in two letters dated 11 September 2003. In those letters he stated that:

(a) Funds were held in the joint names of the deceased and his client;

(b) Given the low value of the estate and because of the likely administration costs of the Guardian Trust, it should renounce its entitlement to become the executor and trustee of the estate.

[19] These statements were not corrected by the practitioner notwithstanding that he became aware on 18 February 2004 that there was a Westpac bank account held in the deceased's name with substantial funds in it.

[20] The practitioner steadfastly maintained throughout the hearing that the information about the bank account was confidential and that professionally he was bound not to disclose it to anyone in accordance with a signed direction he had obtained from his client.

[21] The Tribunal accepts, as did the practitioner, that a barrister and solicitor may not mislead a third party such as the Guardian Trust even if it is the client's instruction to do so.

[22] The Tribunal notes that the statements made in the practitioner's correspondence of 11 September 2003 were correct as at that time. It was not until 18 February 2004 that further information came to his attention concerning the

additional bank account and which raised the question of whether or not disclosure of that should be made to the Guardian Trust.

[23] Counsel for the Committee submitted that one can mislead by omission and urged the Tribunal to accept that the practitioner was obliged to disclose the information by law notwithstanding his claim that it was confidential. He submitted that the relevant documents involved needed to be considered in their totality.

[24] The Tribunal accepts that the practitioner did have a professional obligation to his client to keep confidential the existence of the Westpac bank account when he was directed in writing by his client to do so. Maintaining client confidentiality is a cornerstone of the profession. Having regard to the facts of this case, the Tribunal is not required to consider further the issue of when obligations of non disclosure may be overridden.

[25] From 18 February 2004 when the practitioner became aware of the existence of the Westpac account he did not engage with Guardian Trust before it made its decision to renounce executorship and trusteeship of the estate some five months later. There was no evidence before us that Guardian Trust corresponded with or attempted to engage further with the practitioner before renouncing its executorship. The Tribunal finds that the course of correspondence from the practitioner was not misleading or wrong. The practitioner met his professional obligations as required by Rules 1.01 and 1.08 of the New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors (2004) Seventh Edition.

[26] Arising out of these same matters, the Committee alleged that even if the practitioner's correspondence with the Guardian Trust was not wrong, he was required to advise his client, the widow, of the significant legal risks of not disclosing the Westpac account information.

[27] Counsel for the Committee pointed to the practitioner's letter to his client dated 9 July 2004 in which he mentioned the need for the Guardian Trust to be informed of the investment. He referred to the practitioner's evidence in support of the submission that he did not turn his mind to or advise the widow of the risks of not

disclosing the existence of the Westpac account. The widow did not give any evidence. The Tribunal does not know what may have been discussed with her in respect of the risks of non disclosure. It is not prudent to speculate what such discussion may have been. As it ultimately transpired, other than in relation to theses charges, there was no identified outcome resulting from this aspect. The Tribunal reached the conclusion that the practitioner's conduct was not misconduct and was not negligent or incompetent.

[28] Accordingly, the Tribunal dismissed charge one.

Charge Two

[29] This charge alleges misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Act (disgraceful or dishonourable) and/or wilful or reckless breach of s 4(a) of the Act and/or of r 11.1 of the Lawyers and Conveyancers Act (Lawyer: Conduct and Client Care) Rules 2008. There is an alternative charge of negligence or incompetence in a professional capacity within the meaning of s 241 of the Act and a further alternative charge of unsatisfactory conduct within the meaning of s 12(a)-(c) of the Act.

[30] In September 2008, the practitioner wrote to Westpac in which he advised that his firm was acting for the beneficiaries of the estate of EPF. He said that there was an inability to obtain a Grant of Probate and asked for advice about an alternative method to gain access to the funds or to have them credited to his trust account.

[31] Following advice given by Westpac in its reply of 2 October 2008, the practitioner by letter of 31 October sent the following documents to 'Westpac Banking Corporation Deceased Estates':

(a) A certified copy of the will of EPF;

(b) A certified copy of the Deed of Renunciation of the Guardian Trust;

(c) Claim to moneys held in a Deceased Customer account completed by the widow;

(d) A completed reference by the practitioner as an Acceptable Referee;

(e) A completed letter of direction;

(f) Certified copy of the Death Certificate;

(g) An encoded deposit slip of the practitioner's trust account.

[32] The Claim to Moneys held in a Deceased Customer's account, which the widow completed, declared in clause 4 that she was the Next of Kin and entitled to claim the moneys that are available in the account.

[33] Westpac paid the money held in the account to the trust account of the practitioner on 7 November 2008 where it remained in the name of the widow until August 2013. At that time the moneys less the practitioner's costs (the subject of charge three) were paid to the solicitor who had by then obtained a Grant of Letters of Administration of the estate of EPF in favour of the widow's son C.

[34] The Committee alleges that the documents sent by the practitioner to Westpac were misleading as to the widow's role in respect of the estate and her entitlement to receive the funds. It particularises the misrepresentations as being:

(a) That the widow was entitled to claim the monies as next of kin;

(b) That she was either an executor, an administrator, or a personal representative of the deceased.

[35] Counsel for the Committee submitted that when the documents provided to Westpac are taken together, they are clearly misleading for the following reasons:

(a) The practitioner was well aware that there were issues between the beneficiaries;

(b) The issue of funds held by EPF was a live one between the beneficiaries;

(c) That the practitioner knew that his client had been unwilling to disclose the existence of the Westpac funds.

[36] The Committee has argued that it was wrong for the practitioner to have made bald assertions through the documents:

(a) That he was acting for the beneficiaries;

(b) That the widow was simply entitled to the funds as next of kin;

(c) That the widow in signing the Letter of Direction was an executor, administrator or personal representative when she was not.

[37] It has argued that the documents misrepresented the reality that the widow was only one of the beneficiaries and that she had no formal role in administering the estate.

[38] The practitioner's response to the charge is that there has been no misrepresentation on his part. He has argued that the Death Certificate, Copy Will, Claim to Moneys form, Letter of Direction and the practitioner's letters make clear the following relevant facts:

(a) That the widow is the beneficiary represented by the practitioner;

(b) That the client is one only of the beneficiaries of the estate;

(c) That the widow is not the executor/administrator of the estate;

(d) That as personal representative the widow is claiming only the legal and equitable ownership of the funds which form part of the estate.

[39] Counsel for the practitioner has submitted that it is telling against the charge made against him that Westpac had a copy of the will of EPF and that he was dealing with a specialised area of the Westpac Bank namely its "Deceased Estates".

[40] The Tribunal reached the conclusion that the documents are neither misleading or deceptive. The practitioner's conduct in respect of the preparation and presentation was not misleading or deceptive or likely to be so.

[41] Accordingly, The Tribunal dismissed charge two.

Charge three

[42] This charge alleges misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Act. As with charges one and two there are alternative charges of negligence or incompetence or of unsatisfactory conduct.

[43] This charge relates to the practitioner's conduct in deducting fees owed to him by his client, (the widow), from funds properly due to the estate prior to forwarding those funds to the nominated trust account of a new solicitor instructed by the widow.

[44] The funds received from Westpac were received into the practitioner's trust account on 12 November 2008 and remained there until the widow instructed a new lawyer in August 2013. An authority, signed by the widow, was sent to the practitioner authorising him to pay all funds held by him in trust on behalf of the estate of EPF to that new lawyer who was then acting for the estate.

[45] The practitioner later deducted his costs of $10,009.56 owed to him by the widow personally together with a sum representing tax deducted from the interest earned on the funds held in the trust account, before he transferred the remainder of the funds as directed.

[46] The Committee alleges that the practitioner accepted that when the Westpac funds were paid into his trust account, the widow knew that she held them in her own name as a bare trustee of the estate of her late husband and that she knew that she would have to account for them to the administrator of the estate.

[47] The Committee further alleges that the practitioner knew from at least 23 July 2013 that Letters of Administration had been granted in respect of the estate. It was therefore wrong of the practitioner to have deducted his fees from those funds when those funds were entirely due to the estate. His client was not entitled to the funds in her personal capacity beyond her claim to a share of them as one of the beneficiaries.

[48] Counsel for the practitioner accepted the submission by the Committee that the funds received *"were properly due, in their entirety, to the estate".* He accepted that the widow had no entitlement to them beyond her claim as a beneficiary. He submitted that while the submission by the Committee was correct in law it obfuscated the events which occurred and the instructions received.

[49] Counsel then set out in chronological detail the attempts made by the practitioner to obtain payment of his fees by the widow or by inviting her to get the trustees to give him some authority to deduct them from the funds held on behalf of the estate. As late as 23 July 2013 the practitioner was questioning with the Administrator of the estate about obtaining authority to deduct his fees from the funds held for the estate. The position was not resolved and so the practitioner took the step of deducting his outstanding costs from the funds held in the name of the widow on behalf of the estate. His step of doing so was described by his counsel as having been taken *"after trying tirelessly to resolve the matter and the metaphorical "slap in the face"".*

[50] He has accepted the correctness of the Committee's assertion that *"the practitioner was well aware that the Westpac funds were not available to satisfy outstanding fees".* He argued that the Committee's submission ignored the acceptance by the practitioner of that distinction in the repeated steps that he took to resolve the issue of fees and distribution of the funds.

[51] The Tribunal finds that the practitioner has accepted the charge and that Counsel for the practitioner has made a valiant plea in mitigation.

[52] The Tribunal has considered that plea and has considered the complicated factual situation together with the difficult family dynamics which the practitioner faced along with his wish to resolve matters by completing a Deed of Family Arrangement.

[53] The Tribunal found that the practitioner's conduct in respect of charge three was unsatisfactory and the charge was held to be proved in that respect.

[54] Following that finding the Tribunal imposed the orders for costs that are set out in paragraph [10] of this decision.

[55] The practitioner applied for non publication of his name and of any details that would lead to identification of the estate and his client. The Committee has not opposed the application. The Tribunal has determined that in all the circumstances it is proper to make the order for non-publication and so orders accordingly.

[56] The Tribunal s 257 costs are certified in the sum of $7,077.00.

DATED at AUCKLAND this 13th day of August 2015

BJ Kendall
Chairperson