NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 29

LCDT 002/15

BETWEEN	**AUCKLAND STANDARDS COMMITTEE 4**
	Applicant
AND	**ANTHONY BERNARD JOSEPH MORAHAN**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms C Rowe

Mr W Smith

Mr I Williams

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

DATE 3 August 2015

DATE OF DECISION 21 August 2015

COUNSEL

Mr DCS Morris for the Applicant

Ms P Main for the Respondent

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

Background

[1] The practitioner is a barrister. He was asked to represent the client, Mr Toner, in litigation between the client and his wife in the Family Court at Waitakere.

[2] The client and the solicitor, Mr Thompson, were not known to each other. However, the practitioner wished to introduce them so that the solicitor could act as his solicitor for the purposes of the instruction.

[3] The solicitor says that he was never retained. The practitioner is of the opposite view. We discuss their competing evidence shortly.

[4] The practitioner filed pleadings in the Family Court showing the solicitor as instructing him. But the practitioner cited his own PO Box and email detail as the address for service (at least apparently so).[1]

[5] An issue arose relating to service of certain documents on the client. There was dissension between the two counsel representing the competing parties. Then, the solicitor, Mr Thompson, declined to accept service, saying that he was not the instructing solicitor.

[6] A complaint was made. It was said that either the solicitor wrongly refused to accept service or the practitioner wrongly recorded on the pleadings that the solicitor had instructed him and that the practitioner acted in breach of the Intervention Rule.

[1] Though this is not part of present issues.

The Charges

[7] There was a finding by the Standards Committee that the solicitor had indeed not been properly retained. As a consequence of that finding, ten charges were laid against the practitioner. Leave was subsequently granted to withdraw charges five, six, nine and ten. There are six charges remaining.

(a) Charge one is an allegation of misconduct by wilfully or recklessly acting for a client without an instructing solicitor in breach of Rule 14.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules").[2]

(b) Charge three is an allegation of misconduct by misleading the Court, opposing counsel, and/or the Standards Committee, by asserting in written correspondence and Court documents that Mr Thompson was his instructing solicitor, when the practitioner was aware that Mr Thompson was not in fact his instructing solicitor, or was reckless as to whether or not Mr Thompson was his instructing solicitor.

(c) Charges two and four are charges laid as alternatives to charges one and three and allege unsatisfactory conduct by referring to the particulars asserted in respect of those charges.[3]

(d) Charge seven alleges misconduct in that the practitioner used the name of Mr Thompson on Court documents without his knowledge, consent, or authority.

(e) Charge eight alleges in the alternative unsatisfactory conduct on the part of the practitioner and relies on the particulars set out in charge seven.

[8] In essence the charges assert a breach of the Intervention Rule[4] which provides that a barrister sole must not accept instructions to act for another person who is not a barrister and solicitor holding a practising certificate.

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[2] Section 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 ("the Act").
[3] Section 12(a) and/or (b) and (c) of the Act.
[4] Rule 14.4 of the Rules.

[9] It was common ground at the hearing that the essential questions with respect to all the charges (with the exception of charge numbered seven) included:

(a) Did Mr Thompson, as a matter of fact, participate in the litigation as the practitioner's instructing solicitor?

(b) If he did not, did the practitioner have a genuine belief that Mr Thompson was so instructed?

(c) If so, was the practitioner's belief based on proper and reasonable grounds?

[10] Charge seven is an assertion of misconduct in that the solicitor's name was used on documents filed in Court without the solicitor's knowledge, consent or authority. It is not dependent upon a prior finding as to the existence of a retainer from the client and the reasonable knowledge of the practitioner. For the moment, this decision concentrates on the factual matters raised in the last paragraph.

The Evidence

[11] The Tribunal received affidavit and *viva voce* evidence from the solicitor and the practitioner but not from Mr Toner.

[12] The solicitor says:

(a) At material dates he recognised the obligations upon him according to the Intervention Rule. He asserted that he consistently required certain pre-conditions before accepting an instruction from a client. Those are seen from exhibit GWT 10[5] as including at least:

(i) a description of the legal problem in the client's words together with a full background;

(ii) photo identification;

[5] Exhibit "GWT 10" BoD at 30.

(iii) a Letter of Engagement in the form required by the solicitor;

(iv) a financial retainer for the solicitor and counsel.

(b) The client was introduced to him in an indirect fashion (they never met) but no retainer arrangement was concluded.

[13] The solicitor impressed as a careful and prudent practitioner who was quite aware of his obligations and insisting on certain minimum requirements from a client in consequence. The solicitor was not prepared to act as a mere 'letter box' and (in our view properly) said that he would be bound to receive and review correspondence and documents. He wanted to be in a position to evaluate and have oversight over the conduct of the case by the practitioner.

[14] The practitioner told the Tribunal that:

(a) He wrote to the solicitor on 20 April 2011. He signalled that a file would likely arrive from the client's former solicitor. He undertook to apprise the solicitor if the file arrived at his office.

> "*You might (possibly) get a file from John Appleby at Ladbrook Law relating to Michael Toner …. I explained that you would be my instructing solicitor and would handle any conveyancing … The file may come to me direct, in which case I will let you know. If it arrives at your office, can you let me know?".*

[15] The practitioner then prepared his own form of Letter of Engagement which was signed by the client apparently on 27 April 2011. This was retained in the practitioner's personal file and was not provided to the solicitor (though it ostensibly served to bind the solicitor as well).

[16] It was common ground that the solicitor and the practitioner met informally when the practitioner would call at the solicitor's office. They would discuss legal matters of common interest. There were at least several meetings. The practitioner and the solicitor were at odds as to the number of meetings and whether they in fact discussed the instruction in question. We do not have to resolve their differences for present purposes as our finding is that it is not directly pertinent to the charges, for reasons which will be developed.

[17] On 30 October 2012 the practitioner wrote to the solicitor with an email indicating that the litigation was to be extended from the Family Court to the High Court. He asked whether the solicitor was "*happy to continue as instructing solicitor for the High Court proceedings".* The solicitor replied by email on the same day saying that he could not recall this instruction and that he had no file nor records. He said:

> *"If it is going to the High Court and there needs to be an instructing solicitor that will be fine providing he signs a Letter of Engagement, a retainer is given for you and me and kept topped up and I am kept in the loop with documents and involvement. Our duty is firstly to the court and we must observe this carefully and be on top of it. Sorry to sound pedantic but as lawyers we have to be thorough and careful - too many complaints and problems now for lawyers under the new regime.*
>
> *Let me know what you think and the way forward".*[6]

[18] The practitioner responded the same day apologising "*for not keeping [the solicitor] in the loop".* There was no reference to the existence of the barrister's terms of Letter of Engagement. Rather, he said, "*I have been trying to get original signed instructions through the ordinary mail. They seem to keep going astray. Do you wish to send Michael Toner, via me, a letter of engagement?".* The practitioner expressly acknowledged that it was appropriate to have a retainer contract in place before proceeding in the High Court, seemingly conceding the necessity for this arrangement also in relation to Family Court matters.[7]

[19] The complaint to the Law Society was filed on or about 11 February 2014. The practitioner was apprised and notified the solicitor, who was intrinsically involved. Their exchanges thereafter are important. First, there was a telephone discussion with a file note by the solicitor which recorded the discussion wherein the practitioner admitted that he had kept the solicitor "*in the dark*". Then there was an email from the practitioner which said:

> *"You need to be aware of this, [the complaint] since you are my instructing solicitor, and you are mentioned. …*

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[6] Exhibit "GWT 3" BoD at 22.
[7] Exhibit "GWT 4" BoD at 23.

> *… This is my man who has been working in the Bahamas, and about whom I have had a couple of discussions with you, and exchanged a couple of emails".*[8]

[20] The solicitor responded:

> "*That is annoying for you.*
>
> *I have been waiting for details to get a letter of engagement out for signing and funds in on account of the file.*
>
> *I need those things before I can accept a reverse brief.*
> *I need his details, contact and identification along with funds. Remember I have said to you I need to do this but nothing has happened so I thought it was oof (sic) the boil and been waiting.*
> *I normally open a file when taking a bried (sic) and need to see the papers and have a copy on file.*
>
> *He needs to urgently provide me with confirmation of the instruction and funds.*
>
> *What is this one about?? Is it a separation that has gone wrong.*
>
> *I have no information and I am in the dark.*
>
> *Can you have your client contact me so I can write to him and get the above before I confirm acceptance. He needs to be good for the costs and everything else before I confirm him as a client."*[9]

[21] The client wrote to the practitioner who copied in the solicitor. This was in the following form, which is telling:

> *"Dear Wayne Thompson,*
>
> *On my behalf, please instruct Mr Anthony Morahan to represent me in the property dispute with my ex-wife ... .*
>
> *Please return any correspondence via email if you have any questions as I'm not on the below phone number at present but on a trip to Ireland."*[10]

[22] The solicitor responded directly setting out his standard requirements which we have described in paragraph [17].[11] The client sent a Letter of Engagement to the

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[8] Exhibit "GWT 8" BoD at 27.
[9] See note 8.
[10] Exhibit "GWT 9" BoD at 29.

practitioner. However, this fact was never communicated to the solicitor. The client changed his mind and instructed another solicitor soon afterwards.

[23] The practitioner urged two areas of context as a form of defence. First, the concept of the "Reverse Brief". Secondly, he asserted there was a relaxed practice of the Family Court Bar towards compliance with the Intervention Rule.

Discussion

[24] There is nothing magic in the concept of a Reverse Brief in the sense that the expression connotes only the manner of introduction of a client to the solicitor. It does not alter the elemental fact that no contract of retainer can be concluded between a client and solicitor until they are *ad idem* on its elements. This solicitor had made it clear what he always required, in situations such as this, by his email, exhibit GWT 10.

[25] The practitioner could not sensibly contend that a contract of retainer had been concluded as *inter alia:*

(a) We find that the practitioner knew or ought to have known of the solicitor's attitude and approach to the Intervention Rule and his requirements for a contract of retainer.

(b) The only time the client had been notified of the solicitor's requirements was by the solicitor's email dated 20 February 2014. This was well after the events of concern. Moreover, from the solicitor's perspective, there was no answer.

(c) The client did sign a Letter of Engagement referring to the solicitor but on a form prepared by the practitioner. This was not the authority of the solicitor nor was it ever communicated to the solicitor. It may have given some ground for belief on the part of the client that he had retained a solicitor, but that does not answer the questions we now address.

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[11] An issue of fact arose as to which version of a letter engagement was sent. The email expressly referred to 'version 3' whereas the letter produced by the practitioner was an earlier version. We do not need to resolve this difference in the evidence for our immediate purposes.

[26] We find that it would have been reasonably evident to the practitioner that there had been no meeting of the minds about the retainer from the perspective of the solicitor. Not least, that would have been endorsed when there was the exchange between them in October 2012.

[27] We turn to provide a more specific answer to the two broad questions asked, as recorded in the early part of this decision at paragraph [9]:

(a) There was no reasonable argument that the solicitor had been retained by the client in the circumstances disclosed to us. Though not put to us as a proposition, we note, for the sake of completeness, that the practitioner was not the agent for the client for the purpose of concluding the terms of the retainer. We emphasise, the practitioner served to introduce the two parties only. It follows he could not bind the solicitor in any unilateral way as for example, in terms of his own Letter of Engagement.

(b) We hold that there was no reasonable ground for the practitioner to believe that there was such a retainer in place. As we will develop, he was well aware of his obligations in terms of the Intervention Rule and acknowledged these in a general way. With a client at a distance, he would have understood the need for there to have been a clear communication between the solicitor and client and a good understanding of their respective obligations.

(c) We find that the email correspondence, such as it refers to the possibility of a retainer being in place, is ambiguous at best. Indeed, there is evidence that the practitioner had knowledge directly to the contrary. Not least, it was his decision not to pass his form of Letter of Engagement to the solicitor. There would have been no need for him to apologise to the solicitor subsequently had he truly understood a retainer had been put in place.

[28] When pressed in examination, the practitioner acknowledged he was bound by the Intervention Rule. Notwithstanding he, as did his counsel when closing, repeatedly asserted that there was a relaxed approach to this by the Family Court

Bar.[12] The reasoning given to us was that the typical work of a Family Court barrister resulted in a low fee charged (indeed, the practitioner said that a great deal of his work was *pro bono)* and there was a desire not to further impose on the client the costs of solicitors' fees. Such reasoning may have an initial attraction as being laudable, but the Intervention Rule preserves the distinction between practising as a barrister sole and a barrister and solicitor. *Inter alia,* it serves to ensure the independence of the barrister, provides protection for the client, and allows the solicitor to maintain oversight of the litigation.

[29] The Intervention Rule is part of statue law and is well known to barristers and solicitors. It is not capable of amendment or of being ignored by reason of some informal convention.

[30] Despite the assertion that the practitioner made and recorded in paragraph [28], he in fact conducted himself in such a way that showed his acknowledgment of his obligation to comply with the Intervention Rule. He prepared his own Letter of Engagement which was, in effect, a tripartite arrangement with the solicitor (though, we repeat, this was never shown to or agreed to by the solicitor). The Tribunal was left with the clear impression that his attitude, as to the merit of a relaxed approach to the Intervention Rule, led him to turn a blind eye to the requirements he otherwise acknowledged.

[31] The Tribunal, for the reasons given above, finds that the charges of misconduct specified in charges one and three are made out. The practitioner is accordingly recorded as being guilty of the charges.

[32] We turn to a consideration of charge seven. That is a charge of misconduct within the meaning of s 7 of the Act in that the practitioner used the name of Mr Thompson on documents filed in Court without the knowledge, consent or authority of Mr Thompson. There was no contest to the fact that the practitioner in fact lodged documents with the Court asserting Mr Thompson as his instructing solicitor. We have held that the practitioner had no reasonable ground to believe that he had a retainer from Mr Thompson. We have accepted that Mr Thompson had no

[12] This was an assertion only, and if it was to amount to a material factor in the defence we would have called for better evidence. This was not necessary.

file or copy documents about the supposed retainer and that he had not instructed the practitioner to act. It is axiomatic that it was unacceptable for the practitioner to file substantive documents in Court in Mr Thompson's name.

[33] It follows, therefore, that the practitioner is guilty of misconduct in respect of charge seven and we so find.

[34] Charges two, four, and eight are alternatives to charges one, three and seven and are accordingly dismissed.

Penalty

[34] The Tribunal now directs that submissions as to penalty be filed as follows:

1. Counsel for the applicant is to do so within five working days of receipt of this decision.

2. Counsel for the respondent is to reply to the applicant's submissions within five working days thereafter.

3. Counsel for the applicant may respond to the respondent's submission within a further five working days.

[35] The Tribunal will then consider the matter of penalty on the papers. Either or both of counsel may request a hearing about the penalty to be imposed.

DATED at AUCKLAND this 21st day of August 2015

BJ Kendall
Chairperson