

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 40

LCDT 008/15

**IN THE MATTER**

of the Lawyers and Conveyancers  
Act 2006

**BETWEEN**

**AUCKLAND STANDARDS  
COMMITTEE 4**

Applicant

**AND**

**CAROLE SMITH**

Practitioner

**CHAIR**

Judge D F Clarkson

**MEMBERS OF TRIBUNAL**

Ms F Freeman

Ms C Rowe

Ms S Sage

Mr I Williams

**HELD** at District Court, Auckland

**DATE OF HEARING** 12 November 2015

**DATE OF DECISION** 19 November 2015

**APPEARANCES**

Mr R McCoubrey for the Standards Committee

Mr W McCartney for the practitioner

## **DECISION OF THE TRIBUNAL ON CHARGES**

### ***Introduction***

[1] The Auckland Standards Committee 4 have charged Ms Smith with three charges laid in the alternative: misconduct; or negligence; or unsatisfactory conduct.

[2] The particulars pleaded in support allege breach of a High Court Charging Order, by means of a share transfer. It is also alleged that the effect of the transfer was to defeat the Charging Order.

[3] A last minute application to amend the charge to allege breach of the order “or its spirit and intent” was declined by the Tribunal for the reasons given in our Oral Decision of 12 November.

[4] The order in question was made in enforcement proceedings arising out of a relationship property dispute. Ms Smith represented the husband in relation to commercial interests and various trusts, but did not act in the relationship property proceedings, and was only kept informed of their progress to a limited extent. She was aware of the terms of the Charging Order. The complainant in this matter is the wife in the proceedings.

### ***Issues***

1. What did the order say?
2. Did the practitioner breach or assist in the breaching of that order?
3. If so, does her conduct constitute such 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 registrations as a practitioner*<sup>1</sup> as to be misconduct?

4. If not, has Ms Smith wilfully or recklessly breached any of the Rules pleaded, such as to constitute misconduct?
5. If not, was she so negligent as to reflect on her fitness to practise or as to bring the profession into disrepute?
6. If not, did her conduct “fall short of the standard of competence and diligence” expected, in terms of s 12(a), as pleaded?

### **Background**

[5] Ms Smith is living overseas, but gave evidence by Skype link. We were impressed by her careful and straightforward answers in cross-examination. Having heard the evidence of Ms Smith, we consider that a number of the particulars pleaded are inaccurate. Indeed, in opening, Mr McCoubrey, for the Standards Committee, properly conceded that particular 10 was plainly wrong, if the correspondence relied on was examined.

[6] More importantly, particular 9, which reads: “*On 22 November 2012, (the wife) via her solicitor obtained charging orders over (the husband’s) company Chaylor Investments Limited and all the shares held by Chaylor Investments Ltd including the Chaylor subsidiaries*” is misleading.

[7] The Charging Order, which was an interim one, made by a Registrar on an ex parte application, charged the **beneficial** interests of the husband in various entities, which were then set out in Schedule 2 of the order.

[8] The wife applied for the order to be made final and the husband applied for a stay, having appealed the original award. Neither were successful when these applications were considered by Her Honour, Justice Ellis on 12 March 2013. In the course of that judgment Her Honour recorded the husband’s evidence that he held any shares as a bare trustee and was not a beneficiary of any of the relevant trusts

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<sup>1</sup> *Pillai v Messiter (No.2)* (1989)16 NSWLR 197.

which owned the shares in the 2<sup>nd</sup> Schedule. That evidence was corroborated by Ms Smith, who was not cross-examined. The Judge said: *“While the supporting documentation may be lacking, a good deal of what he says has, as I have said, been confirmed on oath by his lawyer. In the absence of any cross-examination or firm evidence to the contrary I am simply not prepared to discount what she says.”*

[9] There then followed a chain of events where it appears that, on an application for final orders and to sell the shares charged, having declined it previously, and before the allowed time for the husband’s counsel to respond had expired, a Final Charging Order was made by Her Honour. Counsel for Ms Smith submits that the final order was made in error, but that, given the lack of beneficial ownership, this Order (made in May 2013) is a “red herring” for the purposes of these charges.

[10] The order was later referred to by Her Honour as “unhappily worded” and she affirmed that the orders could *“...go no further than is permitted by Part 17 of the High Court Rules. Those rules make it clear that any such order can be made only in relation to property in which Mr M personally has an interest”*. Thus the Judge confirmed that, in the absence of a beneficial interest, the Charging Order did not apply.

[11] Ms Smith, who was the lawyer acting for the trusts was perfectly well aware what beneficial interests were held by her client. She and her client formed the view that a new trustee ought to be appointed to protect the beneficiaries’ interests. A company was formed for the purpose of acting as new trustee and was appointed.

[12] Trust law requires that the shares must be transferred to the new trustee, provided they were not the subject of the Charging Order. We accept Ms Smith’s evidence that she had no doubts that changing trustees was not affected by the Charging Order.

[13] Since Ms Smith’s client was never the beneficial owner, nor even a discretionary beneficiary, and since the owner of the shares was not the debtor, the Charging Order could not apply to the assets which were transferred. No evidence was ever produced by the wife to challenge the view of ownership. There is still no evidence to contradict the husband’s assertions. Thus it would appear his and Ms Smith’s evidence is correct.

[14] Certainly, there was no information which would suggest Ms Smith was entitled to ignore her client's clear instructions as to the transaction.

### ***Discussion***

[15] The Standards Committee carries the burden of establishing the breach of the order, or assistance in the breach, on the balance of probabilities.

[16] Mr McCartney, for Ms Smith, submitted that the order must be clear on its face to be enforceable. Furthermore, it must be followed to the letter. The wording of the order was framed by counsel for the wife, it was "*carefully and deliberately worded as it was in order to catch any (speculated) beneficial interest held for (the husband)*" and clearly referred to beneficial interests of the husband. Ms Smith says that it was followed to the letter.

[17] In submitting that the order must be clear on its face to be enforceable, Mr McCartney referred us to *Savill v Roberts*<sup>2</sup>. That case referred to an injunction but could equally apply here. Holland J said:

"The acts prohibited are those defined in the injunction itself and do not extend to acts of a similar nature to those specified or to acts which achieve the same result by different and not prohibited means."

[18] Mr McCoubrey submitted that "alarm bells" ought to have sounded for Ms Smith, by the making of the Charging Order. It is difficult to see why this should be so. Why would a practitioner, reading an order which referred to beneficial interests, which she knew not to exist, be concerned?

[19] There was no element of subterfuge in the transaction. The unchallenged evidence is that the deed appointing the new trustee stated: "*The retiring trustee wishes to retire...because its shares have become subject to a charging order and the Retiring Trustee does not want to put the Trust's assets at risk*".

[20] Nor is this a lawyer "in cahoots" with her client to avoid a responsibility. The husband has waived privilege to inform the Tribunal that Ms Smith actually urged him

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<sup>2</sup> *Savill v Roberts* unreported Holland J, HC Christchurch, CP 9-86, 10/12/86 at 8.

to simply pay his wife. Indeed, he did so not long after these events. Thus, there was no negative outcome for the wife, who is the complainant in this matter.

[21] We do not consider the Standards Committee has discharged that onus since we are unable to see how Ms Smith can be said to have breached the order at all.

[22] If we are wrong in this, we certainly do not consider this to be a deliberate breach, let alone a wilful or reckless one, which could reach the level of misconduct.

[23] Thus the answers to the questions posed by the issues above are:

1. The Order clearly charged the beneficial interests only of Ms Smith's client, as indeed it must.
2. No.
3. Even if we are incorrect about a lack of breach, the conduct does not reach the threshold for misconduct.
4. No, the evidence does not establish any intentional let alone wilful or reckless element.
5. No, we do not consider the practitioner was negligent. She diligently carried out her client's instructions. Importantly, she was neither instructing solicitor nor counsel acting in the proceedings in question.
6. No, we do not consider any of the grounds which would support a finding of "unsatisfactory conduct" has been made out.

### ***Decision***

[24] For the above reasons, we dismiss each of the three alternative charges.

[25] Submissions as to costs are to be filed by each party within 14 days of the release of this decision.

**DATED** at AUCKLAND this 19<sup>th</sup> day of November 2015

Judge D F Clarkson  
Chair