NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 44

LCDT 003/15

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**THE CANTERBURY STANDARDS COMMITTEE (No 1)** Applicant
AND	**A PRACTITIONER** Practitioner

CHAIR

Judge B J Kendall (retired)

MEMBERS OF TRIBUNAL

Mr J Bishop

Mr W Chapman

Ms P Walker

Mr S Walker

HEARING 18 & 19 November 2015

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 10 December 2015

COUNSEL

Mr T J Mackenzie for the Standards Committee

Ms H Cull QC for the Practitioner

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

Introduction

[1] The practitioner faced a charge of misconduct in his professional capacity pursuant to s 241(a) of the Lawyers and Conveyancers Act 2006 (the "Act"). He was charged in the alternative with unsatisfactory conduct pursuant to s 241(b) of the Act and with a further alternative charge of negligence or incompetence in his professional capacity pursuant to s 241(c) of the Act. The essence of the charge is that the practitioner acted in circumstances where he was conflicted and unable to discharge his obligations owed to each of three clients. It is alleged that he acted contrary to the fundamental obligations of lawyers at s 4 of the Act and contrary to Rules 2.4 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the "Rules").

[2] The full particulars of the charge are discussed in the reasons for the Tribunal's decision which follow commencing at para [7].

[3] The practitioner has denied the charge.

[4] The Tribunal heard the charge on 18 and 19 November 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 found the practitioner guilty of the alternative charge of unsatisfactory conduct in that he had been in breach of r 6.1.2 of the Rules for acting for three clients in conflict of interest. The Tribunal found that the practitioner had not acted in breach of r 2.4 of the Rules in that he had not assisted in the concealment of fraud or crime.

[5] The Tribunal then heard submissions in respect of penalty and then imposed a penalty on the practitioner whereby he was censured; fined $3,000; ordered to pay

costs of $7,500 and required to refund to the Law Society the Tribunal's costs to be fixed under s 257 of the Act.

[6] This decision contains the reasons for finding the practitioner guilty of unsatisfactory conduct and for the penalty imposed.

Background

[7] The practitioner had acted for D for a number of years regarding purchases of properties and sales and in respect of his business. He also acted for him and his wife in relation to property purchases and sales.

[8] D is the executor and trustee of the estate of his uncle who died on 5 June 2010.

[9] By his will dated 8 August 2005, the uncle gave his partner the right to occupy his property. On the expiry of that right, the property or any property bought in substitution for it was to fall into residue. The residue of the estate was gifted to the natural daughter of the uncle and the uncle’s partner (the child having been adopted out shortly after birth).

[10] The estate owned a property at K. It was sold in 2012 and a property at C was purchased in substitution for it. The practitioner acted for the estate on the sale of the K property and on the purchase of the C property which was registered in the name of D.

[11] Subsequently in November 2012, D and his wife entered into an agreement to purchase a property for themselves at J. The practitioner acted for the respective trusts of D and his wife on the purchase of that property. The practitioner was the sole director and shareholder of an independent trustee company which was a trustee of each of the family trusts of D and his wife.

[12] The Bank was providing mortgage finance to the trusts to enable them to complete the purchase of the J property. The practitioner acted for the Bank in that respect.

[13] The Bank's initial instructions to the practitioner were to take a mortgage security over the J property. On the day prior to the settlement of the purchase of the J property the Bank gave the practitioner additional instructions that it required a mortgage over the C property which it initially said was owned by D and his trust (one of the trusts originally referred to in para [11]) as security for that guarantee. The Bank modified those instructions on the morning of the day of settlement to record that the C property was 'owned' by D alone.

[14] The practitioner considered there was a conflict of interest in that D was the registered proprietor of the C property in his capacity as trustee of the estate of his uncle. He referred D to another solicitor for independent advice. That solicitor advised D not to proceed with providing the requested security over the C property. D declined to accept the advice given. The independent solicitor then attended to the completion of the securities. He also attended to the registration of the mortgage documents over the C property.

[15] The practitioner attended to the settlement of the J property and provided a solicitor's certificate to the Bank in which he undertook that the Bank had valid and enforceable securities.

[16] Neither the independent solicitor nor the practitioner advised the Bank at any time that the C property was not owned by D in his personal capacity but rather as the trustee of his uncle's estate.

The Charge

[17] There was a finding by the Standards Committee that the practitioner, knowing that the C property was owned by D as trustee of his uncle's estate, assisted him to act in breach of trust thereby committing a fraud upon a power (r 2.4 of the Rules). It also found that by continuing to act for the estate, the purchasers of the J property and the Bank, the practitioner was conflicted and unable to discharge the obligations he owed to each client (r 6.1 of the Rules).

[18] As a consequence the Standards Committee has charged the practitioner with Misconduct in that he acted contrary to the obligations imposed on him by s 4 of the Act and by rr 2.4 and 6.1 of the Rules.

[19] The facts giving rise to this matter are not disputed. The practitioner has strongly disputed that his actions amount to misconduct or the alternatives of unsatisfactory conduct or negligence or incompetence.

[20] The thrust of the practitioner's defence is that he identified a conflict of interest and sent D in his capacity as trustee of his uncle's estate to an independent lawyer. It was therefore wrong for the Standards Committee to find against the practitioner when the trustee, D, had strong independent legal advice which he rejected. The independent lawyer then acted upon the completion of guarantee; signed the solicitor's attestation to it; acted upon the execution of the mortgage over the C property owned by the estate; completed and signed the client authority which D had signed and dated. He then proceeded to register the mortgage over the estate property. He then sent the documents back to the practitioner rather than sending them to the Bank which is what the practitioner expected him to do.

[21] The practitioner had attended upon the completion of the mortgage documents over the J property. The practitioner sent the documents relating to the J property to the Bank and also the documents relating to the C property which the independent lawyer had sent back to him.

[22] It was urged on his behalf that, with the benefit of hindsight, the practitioner could have reissued the letter which he sent with the documents, requesting the independent lawyer to report to the Bank separately or have given a more detailed explanation to the Bank.

[23] The Standards Committee concluded that D had conducted "a fraud on the estate" by using estate property as security for a personal house purchase. It has alleged that the practitioner assisted that activity by continuing to act for D and that by doing so he was in breach of r 2.4 of the Rules. The rule states:

> "A lawyer must not advise a client to engage in conduct that the lawyer knows to be fraudulent or criminal, nor assist any person in an activity that the lawyer knows is fraudulent or criminal. A lawyer must not knowingly assist in the concealment of fraud or crime."

[24] While acknowledging that the practitioner recognised a conflict of interest and referred D to an independent lawyer, the Standards Committee submitted that such referral did not exonerate the practitioner for the following reasons:

(a) He continued to act in respect of the purchase of the J property and completed settlement of the transaction which included confirming to the Bank by way of a solicitor's certificate that valid and enforceable securities had been provided.

(b) That the practitioner in the full knowledge of the estate fraud being committed by D continued to act for him and therefore assisted in that fraud.

(c) That there was a blatant conflict of interest between acting for the Bank and acting for D in the transaction. The practitioner could not advise the Bank of the imperfections in the security it was seeking particularly relating to the C property because that would have risked upsetting the J transaction.

[25] There was extensive argument from counsel for the practitioner as to whether or not the actions of D were fraudulent or a "fraud on a power" and, if the latter, they were not fraudulent within the meaning of r 2.4.

[26] Counsel for the Standards Committee submitted that the act by D was a fraud on his powers as a trustee and was fraudulent within the meaning of the rule. In that context he submitted that 'fraudulent' had a wider meaning than fraud in a criminal sense. He queried why otherwise would the word 'criminal' be used in the rule. He argued that narrowing the interpretation of the word would reduce the protection of the public and would undermine the purpose of the legislation as provided for in ss 3 and 4 of the Act for the maintenance of public confidence.

[27] The Tribunal has determined that it is not necessary to resolve the argument between counsel. It has found that the practitioner was not in breach of r 2.4. It finds that he did not assist D in respect of the transaction concerning the C property. It reaches that conclusion for the following reasons:

(a) The practitioner at the time of receiving all of the conveyancing documentation recognised a conflict of interest between acting for D personally and in his capacity as trustee of his uncle's estate.

(b) He referred D to an independent lawyer for advice.

(c) It was the responsibility of the independent lawyer, and not that of the practitioner, to advise the trustee of all the implications of entering into the mortgage transaction affecting the estate's property.

(d) The independent lawyer completed all of the documentation associated with the transaction including registering the security such that everything was completed. There was nothing remaining for the practitioner to do in respect of that transaction.

[28] The Tribunal has next considered whether or not the practitioner has acted in breach of r 6.1 of the Rules which relates to the conflicting duties which a lawyer may face when acting for more than one client on a matter. In this case the practitioner was acting for more than one client. He had instructions from the trustees of the trusts of D and his wife respectively. In respect of those instructions it can be said that the practitioner was also acting for himself for the reason that one of the trustees of each of the trusts was an independent trustee company of which the practitioner was the sole director. Additionally he held instructions from D in his capacity as executor of his uncle's estate. Finally, he had two sets of instructions from the Bank to first attend to the completion of a mortgage security over the J property being purchased by the trusts and secondly a collateral security over the estate's C property.

[29] Rule 6.1 provides:

> "A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."

[30] Rule 6.1.2 goes on to provide that:

> "… if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients."

[31] The gravamen of the Standards Committee's case against the practitioner in respect of conflict of interest is that he failed to inform the Bank of the conflict he faced in accepting its instructions.

[32] The practitioner's response to that allegation is that he recognised the conflict of interest and he dealt with it appropriately by sending the instructions to an independent lawyer. He expected that the lawyer would act for both the trustee and the Bank and that it would be that lawyer's responsibility to advise the Bank that he was now acting for it.

[33] His counsel submitted that the notification to the Bank should have come from the independent lawyer and not from the practitioner. The practitioner was faced with the problem that if he had informed the Bank of the conflict then he was in breach of his duty to the trusts for which he was also acting.

[34] The Tribunal finds that the answer lies in the letter of instructions that the Bank sent to the practitioner. Paragraph [2] of the standard letter of instructions advises the instructed solicitor - *If you consider that you cannot act for us, then you must advise us immediately. We may then choose to instruct another solicitor.*

[35] The practitioner did not do so. Rather, he referred that to an independent solicitor. By accepting instructions from the Bank he placed himself in a position where he had a conflict of interest. In continuing to act in the way he did, he overlooked his duties to the Bank and his other clients. He had the option of seeking the informed consent of all parties or terminating the retainers with all clients regardless of the consequences to the transactions involved.

[36] It is for those reasons that the Tribunal has found his conduct to be unsatisfactory.

Penalty

[37] The Standards Committee sought Censure, a modest fine and costs.

[38] The submission was that the practitioner's conduct did not put the consumer at risk, the real focus being the practitioner's obligations to the mortgagee.

[39] Counsel for the practitioner urged the Tribunal to take an even handed approach to penalty by taking into account that the independent lawyer's conduct had been considered at Committee level where a censure, small fine and costs had been imposed with the result that no publication of name followed.

[40] Counsel submitted that the conduct found against the practitioner was less serious than that which had been charged against him and thus entitled him to a heavy reduction in fine and costs that might otherwise have been imposed.

[41] The following factors have influenced the Tribunal in reaching its decision on penalty:

(a) There was no dishonesty on the part of the practitioner. There was a failure to recognise the full nature and extent of the conflict of interest which he faced.

(b) There has been no loss to any person.

(c) The practitioner has been successful in having the Tribunal dismiss the allegation of misconduct by assisting in the conduct of a fraud on a power. Were it not for the fact of that aspect of the charge the matter could have been dealt with by the Standards Committee rather than incurring the costs of bringing it before the Tribunal.

(d) The practitioner has incurred substantial personal costs in defending the allegations made against him to the extent that his ability to pay costs in this matter is seriously reduced.

Censure

[42] *Practitioner, the Tribunal has found that your conduct in respect of the transactions on which you had received instructions was unsatisfactory. You faced a series of conflicts of interest. You failed to recognise the full extent of that conflict especially in relation to the Bank and accordingly failed to protect those interests to the exclusion of others.*

Non - Publication of name

[43] The practitioner sought an order that his name not be published. The Standards Committee did not strenuously oppose that application but pointed out that there is a presumption in favour of publication and that it is for the applicant to advance grounds why publication of name should occur.

[44] Having heard from the practitioner's counsel, the Tribunal made an order that his name not be published after taking into account the following:

(a) There was no loss to any person.

(b) His conduct was at the lower end of seriousness.

(c) There was no dishonesty on the part of the practitioner and no personal gain.

(d) He had suffered personally in respect of the matter.

(e) There was no previous history that needed to be considered.

(f) It was appropriate that he be treated in the same way as the independent lawyer was by the Standards Committee.

Summary of orders

1. Censure.

2. Fine of $3,000.

3. Costs pursuant to s 249 of the Standards Committee fixed at $7,500.

4. Section 257 costs of the Tribunal of $6,126, to be paid by the New Zealand Law Society.

5. The practitioner to reimburse the New Zealand Law Society for the s 257 Tribunal costs.

DATED at AUCKLAND this 10th day of December 2015

BJ Kendall
Chair