NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 61

LCDT 037/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**HAWKE'S BAY STANDARDS COMMITTEE** Applicant
AND	**JONATHAN CHARLES HEAPHY** Of Havelock North, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Mr A Marshall

Mr P Shaw

HEARING at Hastings

DATE OF HEARING 16, 17, 18 September 2014

APPEARANCES

Mr P Collins for the Standards Committee

Mr D O'Connor for the Practitioner

RESERVED DECISION GIVING REASONS
FOR ORAL DECISION OF 18 SEPTEMBER 2014

[1] Mr Heaphy had been acting for Mr Porter for seven years when, in early December 2006, Mr Porter was "raided" by the fraud division of Immigration New Zealand.

[2] Mr Porter had been, over that period, building (with others) a successful business of supplying labour for the horticulture and related industries in the North and South Islands of New Zealand. Most of the labourers were migrants and their apparently illegal status and tax status were the underlying reasons for the unexpected and wide ranging search warrants executed on Mr Porter's premises.

[3] Mr Porter had also been increasing his personal asset base, and therefore there was frequent contact between he and his lawyer, Mr Heaphy. As a result they developed a close relationship which extended into a personal relationship. The two men and their families had even holidayed together.

[4] Mr Porter would frequently contact Mr Heaphy for advice outside normal office hours, and clearly relied on his lawyer and friend quite heavily.

[5] Soon after the raid, Mr Heaphy discovered the extent and depth of the investigation by Immigration New Zealand, and the likelihood that it would lead to his client facing serious charges. He sought to urgently protect his client from an attack on his assets, which he saw arising from two sources, which will be referred to later.

[6] The extent of Mr Porter's own "panic" and motivation to shelter assets was the subject of considerable dispute in the evidence.

[7] It is the steps carried out in the name of asset protection for Mr Porter, which form the basis for the first two charges against Mr Heaphy.

[8] Although we preferred the evidence of the lawyer to that given by the client, Mr Porter, we found that Charges 1 and 2 had been proved, to the level of misconduct.

[9] We dismissed the remaining two charges. All of the charges are annexed as a Schedule to this decision.

[10] Our reasons for the findings, which we announced to the parties on 18 September, at the conclusion of the hearing, are as follows; and address the issues to be determined.

Issues

Charge 1

1. Was the investment of $130,000 authorised at any level by the client?

    (a) Do the emails found an instruction to the lawyer?

    (b) Were there also verbal instructions?

    (c) Did Mr Porter know of an overseas investment, but chose not to know the details?

    (d) If a general authority to invest the funds was given was that authority given on the basis that Mr Heaphy would exercise his own personal skill and judgment in making the investment, in documenting it, and monitoring it?

    (e) Did the practitioner comply with the provisions of s 89 of the Law Practitioners Act 1982 and other Rules of Conduct?

2. If Mr Heaphy's version is accepted, does that reduce his culpability - ie: does the conduct still amount to misconduct?

(a) Does the lack of documentation, enforceability and transparency take the transaction beyond the level of negligence?

(b) Did the practitioner's failure to follow up the investment or in any way monitor it aggravate the conduct?

(c) Does this amount to an abrogation of a lawyer's duty to a client to such an extent as to demonstrate an "*indifference to and an abuse of the privileges which accompany registration as a legal practitioner*"?[1]

Charge 2

The conflict of interests is admitted. It is admitted that neither client received proper disclosure, nor independent legal advice, nor waived it.

1. Are the consequences relevant to the level of seriousness?

2. In the circumstances of this transaction, was the admitted conflict so serious as to be "*sufficiently reprehensible or indifferent, to amount to an abuse of the lawyer's professional privileges justifying a finding of serious misconduct in the interests of protecting the public*"?[2]

Charge 3

1. Has it been established to the level required that the fees in question were "rendered" by Mr Heaphy?

2. If so, was the rendering disgraceful or dishonourable?

3. If so, was this behaviour mitigated by the seeking of independent advice?

[1] *Complaints Committee No. 1 of Auckland District Law Society v C* [2008] 3 NZLR 105, [33].
[2] Re *A* (Barrister and Solicitor of Auckland) [2002] NZAR 452, [52].

Charge 4

1. Did Mr Heaphy intend to impersonate or merely anonymise his complaint by use of the client's email address?

2. If established, at what level does this charge fall - misconduct or unsatisfactory conduct?

[11] Some further background details are necessary to discuss what led to the transactions in question.

[12] Firstly, in relation to the company of which Mr Porter was Managing Director, a majority share of this had been sold to what will be referred to as the "parent company" in or about September 2005. As a result of this share purchase, personal warranties were provided by Mr Porter that no dishonest practices including the breach of any immigration laws were being undertaken.

[13] Immediately following the raid, the CEO of the parent company arrived in Hawke's Bay in an agitated state. A meeting was held at which both Mr Heaphy and Mr Porter were present, during which at least one of the other directors was dismissed and sent away.

[14] Although Mr Porter, and his accountant, sought to downplay the risks posed by any contemplated civil litigation on the basis of the warranties, Mr Porter finally conceded towards the end of his evidence, that the CEO Mr H had made at or around the time of this meeting, a direct threat to him to bankrupt him and his family trusts, framed in very strong language.

[15] It is completely understandable that both Mr Porter and Mr Heaphy would have been very alarmed by these statements.

[16] The second area of risk foreseen by Mr Heaphy, during this post-raid period, was that relating to unpaid taxes of various sorts.

[17] Mr Heaphy became aware that there would be allegations of huge cash payments having moved through Mr Porter's company, using false invoices and the

physical movement of cash. Although at the time, Mr Porter denied involvement in these fraudulent transactions; his lawyer was concerned about the prosecution allegations, to say the least.

[18] It was against this background that Mr Heaphy sought advice from an expert in asset protection, on Mr Porter's behalf. That advice of that independent accountant was that Mr Heaphy should liquidate at least $1 million of his assets and move the proceeds out of New Zealand. However on learning that the fee for that type of transaction would be $100,000 Mr Porter firmly declined the advice.

[19] Instead, Mr Heaphy proposed a more modest scheme. This scheme involved Mr Heaphy selling to his siblings, his share in a property owned by his family. In essence this freed up $130,000 paid in four tranches of liquidated funds. Mr Heaphy then set about looking for an overseas investment for his client. It was at this point that the lawyers conduct, by his own admission, went seriously awry.

[20] Mr Heaphy had another client, Mr A, who had a proposed business venture for the marketing of body products under a trademark which he had previously secured and required capital to purchase stock. Mr Heaphy indicated he had a client (Mr Porter) wishing to make an overseas investment and a series of proposals as to investment amounts and various interest rates and terms were exchanged.

[21] Some of these emails form the basis for Mr Heaphy's assertion that he did have instructions from his client to place the funds in this manner, an assertion which was subsequently denied by Mr Porter in the course of his complaint to the Law Society. The emails read as follows:

> "**From:** Jonathan Heaphy
> **Sent:** 16 April 2007 1:17 p.m.
> **To:** 'Mike Porter'
> **Subject:** Investment opportunity
>
> Mike
>
> You want to invest 30k to make 40k over 15 months? Equates to 26.66% pa return.

From: Mike Porter
Sent: Monday, 16 April 2007 2:38 p.m.
To: 'Jonathan Heaphy'
Subject: RE: Investment opportunity

yes

From: Jonathan Heaphy
Sent: 16 April 2007 3:13 p.m.
To: 'Mike Porter'
Subject: RE: Investment opportunity

What about 40k to become 55k? This one is 30% return.

From: Mike Porter
Sent: Monday, 16 April 2007 3:50 p.m.
To: 'Jonathan Heaphy'
Subject: FW: Investment opportunity

What about 100k??

From: Jonathan Heaphy
Sent: 16 April 2007 5:04 p.m.
To: 'Mike Porter'
Subject: RE: Investment opportunity

This becomes 130k at 18 months, with borrowers right to enlarge to 24 months at 135k.

From: Mike Porter
Sent: Monday, 16 April 2007 6:15 p.m.
To: 'Jonathan Heaphy'
Subject: RE: Investment opportunity

Who is it? It sounds too good……..

From: Jonathan Heaphy
Sent: Wednesday, 18 April 2007 12:21 p.m.
To: 'Mike Porter'
Subject: RE: Investment opportunity

It has now been done, following negotiations yesterday i.e. 80k to be 109k in 15 months.

If there is desire to do further lending please advise.

Regards

Jonathan

From: Mike Porter
Sent: Tuesday, 5 June 2007 5:29 p.m.
To: 'Jonathan Heaphy'
Subject: trust account

Please urgently invest surplus funds as per the recent high return investment.

Cheers

Mike"

[22] Mr Heaphy also contended, and we accepted, that there had been a telephone call which occurred between the last two emails which also confirmed his instructions to invest the funds.

[23] There is a clear conflict of interest created by the investment in which Mr Heaphy's represented the two clients, as lender and borrower; in which neither received independent advice. This is conceded by the practitioner.

[24] Furthermore the funds were not paid directly to the client but to the bank account of some friends of his. There was no documentation to secure the borrowing. There was no record of where the funds went after the deposit into the intermediaries' bank account and no attempt to trace this by Mr Heaphy. Over the following 18 to 24 months (the term agreed for the investment) Mr Heaphy did nothing to follow up the investment or keep tabs on his client Mr A as to how the business was progressing or to receive any assurances as to repayment.

[25] The business was a failure and the funds totalling $130,000 were lost.

[26] In making his complaint and consistently in his written evidence prior to the hearing, Mr Porter denied having authorised this investment, asserting the emails to be exploratory only.

[27] He contended that it was, throughout this period, Mr Heaphy who was so insistent on the asset sheltering scheme. He asserted that the funds were placed entirely without his authority. Mr Porter was supported in this assertion by his accountant, Mr Barnes, who said that he thought Mr Heaphy had been overreacting at the time about the risk posed to Mr Porter's assets.

[28] Mr Barnes was cross-examined before the Tribunal. We found him to be a straightforward and honest witness, however what became clear was that he was completely uninformed as to the nature of the fraud which was subsequently admitted by Mr Porter. Neither at the time of the criminal trial, in 2010, nor up to this disciplinary hearing, had Mr Barnes read the sentencing notes of the Judge, nor the detailed summary of facts to which Mr Porter pleaded guilty on the third day of a six-week fraud trial. We consider this seriously diminishes the reliability of Mr Barnes' assessment of Mr Porter's state of mind immediately after the raid and leading up to this investment and therefore the likely instructions given by his client. Thus we are unable to give any weight to Mr Barnes' evidence.

Criminal Proceedings

[29] The admitted summary of facts in the immigration fraud proceedings are of significance to this matter because not only do they bear directly on Mr Porter's own credibility, having regard to the level of deceit practiced and for which he was sentenced to three years imprisonment, but also, we consider that the figures involved in the fraud perpetrated by Mr Porter and his co-directors gives some indication of how at risk he may have seen his assets should he be convicted.

[30] We interpose that, as a result of a negotiation leading up to the guilty plea the Inland Revenue Department undertook not to proceed against Mr Porter in respect of the unpaid PAYE and GST payments involved in the fraud.

[31] In essence, the summary of facts outlines a practice which had continued in Mr Porter's company (of which he was Chief Executive) of rendering false invoices through agents, drawing cash funds and making cash payments to immigrant labourers with a percentage being held by the directors in what was referred to as "bush money". The figures are astounding and were recorded by the sentencing judge as to have been approaching the region of $100,000 per week. In addition to the cash payments there were allegations that the immigrant workers were instructed how to avoid immigration checkpoints and were, in all likelihood paid under the appropriate rate for the long hours and seven-day-per week work undertaken by them. They were also at times housed in substandard accommodation. Transportation of the workers to the South Island was undertaken by the directors including Mr Porter. He was also responsible for transporting large sums of cash.

[32] Mr Porter maintained denial of his direct involvement in any of these matters until the end of the second day of his trial when the weight of the prosecution evidence was such that on the advice of his counsel he decided to enter a guilty plea. That evening he confessed to his family his involvement in the scheme. Mr Heaphy learned of this from Mr Porter's criminal barrister shortly afterwards.

[33] Given Mr Porter's own knowledge of what had actually occurred, it is simply not credible for him to assert that he was in any way relaxed about the preservation of his assets and that the asset sheltering scheme was totally driven by Mr Heaphy.

Credibility

[34] In addition to this logical deduction there were numerous indicators during Mr Porter's cross-examination, that he was simply obfuscating or manufacturing his evidence as he went.

[35] Counsel for Mr Heaphy produced to us in closing submissions a summary of the numerous points where Mr Porter's evidence was inconsistent with the evidence of other witnesses or internally inconsistent. We found his submissions on credibility to be compelling. A clear instance was Mr Porter's inability to pinpoint the time when he said he knew the investment had been lost. His answers to this question in the course of his cross-examination, ranged over a period of some years.

[36] His evidence that, immediately after the investment was made and confirmed to him by Mr Heaphy that he phoned and "berated him" lacks any credibility. Not only is it inconsistent with the emails which had led up to the investment but also totally inconsistent with his behaviour towards his lawyer subsequently. While sentenced to a term of imprisonment Mr Porter had Mr Heaphy manage his affairs under a power of attorney which, on his version of the evidence would have required him to grant this important power to a man who had just placed $130,000 in an unknown destination without his consent. This totally conflicted with his evidence that he gave Mr Heaphy his power of attorney because he "trusted his integrity, honesty and professionalism".

[37] Where the evidence of Mr Porter differs from that of Mr Heaphy we prefer the evidence of Mr Heaphy.

Charge 1, Issue 1(a) and (b)

[38] On the balance of probabilities we find that Mr Heaphy did have some level of authority from Mr Porter to invest $130,000 of Mr Porter's funds. This authority is found in email instructions, verbal instructions which supplemented those and finally the confirmatory letter which was signed by Mr Porter and his wife some months after the transactions occurred. This was a lengthy letter recording the various instructions and advice sought and given and recording that there had been a "speculative overseas investment" made on behalf of the clients. Mr Porter's suggestion that he had not read this letter, which had been in his possession for many weeks before he signed and returned it to Mr Heaphy, lacks credibility.

Charge 1, Issue 1(c)

[39] We also accept Mr Heaphy's evidence that while Mr Porter knew that the funds had been sent overseas, Mr Porter agreed with the suggestion that he ought not to know the details, so that there was effectively a situation of "plausible deniabilty" in place on his part. We are concerned that a lawyer would participate in such a scheme.

Charge 1, Issue 1(d)

[40] We accept Mr Porter gave Mr Heaphy a general authority to invest $130,000 of Mr Porter's funds and to transfer those funds from the trust account to implement a suitable investment. Whilst we accept this we are of the view that the authority given to Mr Heaphy was given on the basis that Mr Heaphy would exercise skill and care and his own personal professional judgment in making the investment. Mr Heaphy failed to do this.

[41] In our view Mr Porter did not authorise Mr Heaphy to invest his funds without Mr Heaphy exercising some personal judgment as to the viability of the investment, without some appropriate form of documentation of the investment and without ensuring the investment that Mr Heaphy was sanctioning was actually made. Because Mr Heaphy failed to do any of these things the actual investment that was made was not an investment of the type and quality that Mr Porter authorised Mr Heaphy to make. In essence, it was an unauthorised investment.

Charge 1, Issue 1(e)

[42] Issue 1(e) is a different matter. Section 89 of the Law Practitioners Act 1982, the legislation then binding upon the practitioner reads as follows:

> **89 Solicitor to pay client's money into trust account at bank**
>
> (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.
>
> (2) No such money shall be available for the payment of the debts of any other creditor of the solicitor; nor shall any such money be liable to be attached or taken in execution under the order or process of any court at the instance of any such creditor.
>
> (3) Every solicitor who knowingly acts in contravention of this section commits an offence against this Act.
>
> (4) Nothing in this section shall be construed to take away or affect any just claim or lien that any solicitor may have against any money so received by him.

[43] This section is relied upon by the Standards Committee as are the Solicitors' Trust Account Rules 1996. There are a number of rules pleaded, however the definition of "solicitor" is a complicating feature of the rules in that some obligations are imposed on a principal only and some on all solicitors.

[44] The parties provided arguments in this respect because Mr Heaphy was not a principal in his firm, rather an employed solicitor. Thus he argued that he did not have the obligations under Rule 5 for example as to receipt and payment of trust money. He was in any event bound by Rule 3 which read as follows:

> **3 Client assets to be managed in accordance with instructions**
>
> (1) Unless otherwise required by law, a solicitor must deal with client assets only in accordance with the instructions of the client (and, in particular, may not pay, transfer, or charge any client assets except in accordance with such instructions).
>
> (2) Evidence of instructions of a client must be retained by the solicitor for at least 6 years.

[45] The Standards Committee withdrew its reliance on Rule 10.

[46] Given our finding that Mr Heaphy had a level of authority from the client we do not consider that he has breached s 89. However in relation to Rule 3 it was his

responsibility to get clear instructions on the specific overseas investment to be made.

[47] We have found that Mr Heaphy had instructions to invest $130,000 of Mr Porter's money. Those instructions did not however permit Mr Heaphy to act as he did in making the investment of Mr Porter's funds. He was required by the instructions of the client to fulfil the trust imposed on him by making a thorough analysis of each investment proposal considered by him and to exercise a personal and professional judgment as to the viability of the investment.

[48] The evidence and admissions made by Mr Heaphy clearly establish that he failed to exercise any personal judgment as to the viability of the investment he was making on Mr Porter's behalf. He saw no business plans, no books of account for the entity to which the loan was being made. We are unsure as to whether he even knew the identity of the borrower. There was no proper documentation and no oversight of the investment. As such we find that Mr Heaphy failed to deal with his client Mr Porter's assets in accordance with the instructions of the client and that Rule 3(1) has not been complied with. There was no compliance with Rule 3(2).

[49] We also find that Mr Heaphy's conduct in making the investment constituted a breach of Rules 1.01 and 1.06 of the Rules of Professional Conduct.

Charge 1, Issue 2

[50] Mr Heaphy accepts that in the circumstances of huge pressure which existed at the time this investment was made, that is the pressure that his client was under facing charges carrying lengthy terms of imprisonment and threats of civil proceedings, and then the external pressures upon the practitioner himself contributed towards his lack of professionalism. One of the partners in the firm had become ill and there was considerable pressure within that firm at the time of these events. That does not diminish the practitioner's obligations, as submitted by Mr Collins on behalf of the Standards Committee, to stand back and bring independence, calm, detachment and wise judgment to a client in distress and panic.

[51] Mr Heaphy's responsibility extended to a proper documentation of the transactions (putting aside the issue of conflict) and sufficient detail and security to

enable the investment to be the subject of enforcement if necessary. He had an obligation to know precisely where the funds were held and to follow up.

[52] As conceded by Mr Collins, this practitioner has had an otherwise satisfactory lengthy legal career but that this series of transactions demonstrated a significant lack of professional judgment.

[53] The consequences for his client have been disastrous despite the lawyer's best intentions.

[54] We find that, even rejecting Mr Porter's evidence and accepting that he was fully on board with the asset sheltering scheme, the lawyer's conduct was at the level of serious negligence at the "*C case*' level.[3]

[55] In relation to consequences, the *W*[4] decision is of assistance:

> "[53] There was some discussion during the hearing about the extent to which the consequences of a breach of undertaking could be taken into account in determining the negligence was of such a degree as to reflect on fitness to practice or determined to bring the profession into disrepute. Counsel were agreed that the consequences of a breach which are foreseeable either at the time it is given or at the time of the breach, may be relevant to that determination. We agree. Where, for example, serious consequences are known or reasonably foreseeable at those times, that must bear on the determination of the charge under s.112(1)(c) or, indeed, on a charge of professional misconduct." (emphasis added)

[56] In so far as Rule 5 is concerned, we accept Mr Collins' submission to the effect that it is the professional responsibility of an employed solicitor to draw matters to the attention of the partner who is responsible for discharging the obligation under that Rule, where applicable.

[57] The answer to Issue 2(a) is that we consider this is beyond mere negligence and to Issues (b) and (c) the answer is also "yes". Accordingly, we find the Charge of misconduct proved to the requisite standard.

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[3] See note 1.
[4] *W v Auckland Standards Committee No. 3 of the New Zealand Law Society* [2012] NZCA 401, [53].

Charge 2

[58] The primary issue to be determined was whether this charge fell within the negligence alternative or was at the level of misconduct. The Standards Committee relied on Rules 1.04 and 1.09[5] which read as follows:

> "**Rule 1.04**
>
> **A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties**.
>
> *Commentary*
>
> (1) A conflict of interest does not exist between the parties simply because the practitioner is acting for more than one of them.
>
> (2) A practitioner should exercise careful professional judgement to ensure that a conflict of interest does not exist and is not likely to arise.
>
> (3) (not applicable)
>
> (4) A potential conflict of interest is a situation, which without care, could well lead a practitioner into a breach of fiduciary duty. …"
>
> "**Rule 1.09**
>
> **In most circumstances, a practitioner is bound to disclose to the client all information received by the practitioner, which relates to the client's affairs. There are certain exceptions, which include cases where one of the reasons are set out in ss 27-29 of the Privacy Act 1993 provides good reason to refuse a request from the client for access.**

[59] The commentary expands upon this rule and then refers to the decision of *McKaskell v Benseman*.[6] This decision was also relied upon by Mr Collins in his submissions. The following citation is of relevance:

> "A primary obligation of the fiduciary is to reveal all material information that comes into his (or her) possession concerned with his (or her) client's affairs. The emphasis is on what is material or essential. That is a matter of judgment by the solicitor on the facts of each case, for certainly he (or she) is not obliged to pass trifling and insignificant detail."

[5] Rules of Professional Conduct for Barristers and Solicitors (7th ed.).
[6] [1989] 3 NZLR 75.

[60] We accept the submission advanced by Mr Collins that Mr Heaphy failed in his duty to Mr Porter by not disclosing the fact of the conflict of interest, the identity of Mr A and the historical problems with Mr A's creditworthiness.

[61] As conceded in his evidence by Mr Heaphy, the conflict was a glaring and obvious one against which both clients deserved to be protected, but in particular the investing client, Mr Porter.

Consequences

[62] We do consider the consequences are relevant to the degree of culpability and therefore our decision as to which of the two alternative charges is established. We refer to the citation in paragraph [55] above from the *W*[7] decision.

[63] The consequences of the practitioner's decision to either put or allow his client to maintain a position of plausible deniability, meant that he fell into the errors of failing to properly inform Mr Porter as required.

[64] Once again, we accept the submission that this lawyer allowed himself to become caught up in the client's panic and stressful situation to the extent that he completely lost independent judgement. Mr Heaphy conceded that this had been a situation where he had become too close to his client and as a result lost his perspective.

[65] Thus to answer Issue 2 of Charge 2 is that we do consider that the culpability reaches the standard of misconduct in terms of the definitions already quoted.

Charge 3

[66] This charge arose out of complex and retrospective billing which took place after Mr Porter was released from prison and challenged Mr Heaphy's firm about the lost investment of $130,000. It was Mr Heaphy's evidence that he had felt very badly about this loss and therefore that there had been a tacit understanding with his client that he would not be billing him for a great deal of unbilled work carried out from the time of the raids onwards. During this period significant accounts had already been

[7] See note 4.

rendered to Mr Porter but when reassessed by Mr Heaphy very carefully going back and reconstructing his records and files (but without electronic time records) there was an outstanding amount of over $200,000.

[67] Following Mr Porter making it clear that he was claiming that he had not authorised the $130,000 investment and would be seeking some compensation, the unbilled time was assessed and rendered in the form of 73 invoices on the firm's letterhead. The process of reconstruction of the invoices was complicated and took Mr Heaphy some two months. In the meantime a complaint had been made to the Law Society about the investment.

[68] During this time, Mr Heaphy not only consulted with his senior partner but also sought an independent opinion from a barrister. Furthermore, prior to the invoices being rendered, after the barrister advised that there was no reason why this should not occur (other than the risk of a further complaint), at the request of his senior partner, Mr Heaphy also referred the matter to the firm's professional indemnifier's solicitor. He also, with one slight change expressed the view that there was no reason why the bills could not be rendered.

[69] The Standards Committee submitted on the other hand that the billing was disgraceful or dishonourable in that it took the form of a retaliatory response to a client's intended claim or complaint.

[70] We accept the submission that lawyers ought not to render accounts solely for the purpose of forestalling a claim or complaint against them. To do so could certainly be regarded as disgraceful or dishonourable.

[71] We dismiss this charge because we were left in doubt as to who was responsible for rendering the invoices. There was a conflict of evidence on this point and we were not satisfied that it had been established on the balance of probabilities that the fees had been rendered by Mr Heaphy.

[72] We note that the invoices have now been withdrawn and no outstanding funds are sought from the client.

Charge 4

[73] We do not propose to go into the background detail of this charge which involved the use by the practitioner of his client's email in order to disguise an inquiry he was making of the local council. Mr Heaphy had his client's email password for various tasks that he carried out for his client during his term of imprisonment. Furthermore he had checked with Mr Porter's partner about that use and signalled to her the nature of the email he intended to send.

[74] We consider that Mr Heaphy's view that he had permission to use the email for that purpose was borne out on the evidence, and therefore we regarded it as an authorised use of the email. While it was unwise of the practitioner, given the closeness of the relationship with his client and the surrounding circumstance, we do not consider that his actions reach the standard of even unsatisfactory conduct. For these reasons the charge was dismissed.

Directions

1. The Standards Committee is to file submissions as to penalty by 29 October 2014.

2. The practitioner is to file his submissions as to penalty by 5 November 2014.

3. The penalty hearing is scheduled for 11 November 2014 at 2.00 pm, in Auckland.

DATED at AUCKLAND this 9th day of October 2014

Judge D F Clarkson
Chair

Schedule

Hawke's Bay Lawyers Standards Committee charges the respondent, pursuant to section 241 of the Lawyers and Conveyancers Act 2006 ("the Act"), with:

1. Misconduct;

   (a) Charges one and two, which are concerned with conduct occurring before 1 August 2008, being misconduct in his professional capacity; and

   (b) Charges three and four, being misconduct under s.7(1)(a)(i) of the Act.

2. Or, in respect of charges one and two, *in the alternative*, negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

3. Or, in respect of charge four, *in the alternative*, unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct.

Charge One – unauthorised investment of client funds

The particulars of the charge are that:

(a) During the period 17 April to 20 June 2007, while acting as solicitor for his client, Michael Wauchop Porter ("Mr Porter"), he invested funds belonging to Mr Porter without his instructions, contrary to: s.89(1) Law Practitioners Act 1982, Rules 3, 5(7)(b) and 10(a) & (b) Solicitors Trust Account Rules 1996 ("STAR"), and Rules 1.01 & 1.06 of the Rules of Professional Conduct for Barristers & Solicitors ("RPC");

(b) He transferred Mr Porter's funds to the bank account of persons named NA & SM W, purportedly for investment of an unspecified nature and on terms unknown to the respondent, without Mr Porter's knowledge or his instructions, in the following amounts and on the following dates:

   (i) $15,000 on 17 April 2007;
   (ii) $65,000 on 18 April 2007;
   (iii) $40,000 on 12 June 2007; and
   (iv) $10,000 on 20 August 2007;

   ("the investments");

(c) The investments were made contrary to:

   (i) Section 89(1) Law Practitioners Act 1982: because the funds were held on behalf of Mr Porter and were paid to NA & SM W, purportedly for investment, without any direction being given by Mr Porter;

(ii) Rules 3 & 5(7)(b) STAR: because he made the investments in the absence of any instructions or authority from Mr Porter and in the absence of any written record of any instructions or authority;

(iii) Rule 1.01 RPC: because the transfer of Mr Porter's funds, described in the above particulars, was an abuse of the relationship of confidence and trust he had with Mr Porter; and

(iv) Rule 1.06 RPC: because, in purporting to advise Mr Porter about the investments, he failed to act as an independent adviser in his client's best interests.

Charge Two – unauthorised investments – concurrent client relationships and conflicting duties – non-disclosure

The particulars of the charge are that:

(a) The Standards Committee repeats the above particulars;

(b) At the time of the investments, the respondent had a lawyer and client relationship with the person he intended to be the recipient of the funds, Mr A;

(c) The respondent did not disclose to Mr Porter:

(i) The fact that he had an existing client relationship with Mr A;

(ii) That he was committing Mr Porter's funds into an investment of which he (the respondent) lacked any knowledge as to its terms and any risks that might be incurred; or

(iii) That he was intending to deposit Mr Porter's funds with persons named NA & SM W of whom he had no knowledge and whose connection with or responsibility for the investment was unknown to him.

(d) In the circumstances described in the particulars above, the investments were made contrary to:

(i) Rule 1.04 RPC: because the respondent acted for more than one party in the same transaction or matter without Mr Porter's prior informed consent; and

(ii) Rule 1.09 RPC: because he failed to disclose to Mr Porter that he was unaware of the terms and circumstances of the investment to which the funds were to be applied.

Charge Three – disgraceful or dishonourable fee charging practice

The particulars of the charge are that:

(a) On 14 August 2012, he rendered 73 fee invoices to Mr Porter, for fees in the total sum of $348,856.53, including GST and disbursements, with a net amount said to be payable in the sum of $234,008.04, purportedly for attendances during the period 2005–2011;

(b) The fees were not referable to the provision of legal services for which fees could reasonably or legitimately have been charged;

(c) The fees were not justified by any acceptable fee charging practice in the context of the lawyer and client relationship between the respondent and Mr Porter; and

(d) The rendering of the fee invoices, in the amounts and in the circumstances in which it occurred, was disgraceful and dishonourable.

Charge Four – impersonation of client in email communication with Hastings District Council

The particulars of the charge are that:

(a) During the period 24 July 2010 to 25 July 2011, while acting for Mr Porter, he was authorised to have access to Mr Porter's email account, at address mwports@gmail.com, for legitimate purposes in the administration of Mr Porter's affairs;

(b) On 29 June 2011, he sent an email from Mr Porter's email account to the Hastings District Council, for the purpose of objecting to certain activity occurring on a property adjacent to his (the respondent's) home;

(c) The email was prominently headed "Michael Porter" and concluded with the notation "regards MWP"; and

(d) The respondent's purpose in sending the email in this manner was to deceive the Hastings District Council about the identity of the person objecting to the activity on the neighbouring property.