

**BEFORE THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 62

LCDT 005/14

BETWEEN

**STANDARDS COMMITTEE OF THE
OTAGO BRANCH OF THE NEW
ZEALAND LAW SOCIETY**

Applicant

AND

NOEL RAYNER

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Ms S Hughes QC

Mr W Smith

Mr S Walker

HEARING at Dunedin

DATE 19 August 2014

COUNSEL

Mr G Nation for the Standards Committee

Mr L Andersen for the Practitioner

**RESERVED DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS
DISCIPLINARY TRIBUNAL CONCERNING CHARGE**

Introduction

[1] The practitioner is charged with misconduct in his professional capacity, or in the alternative, unsatisfactory conduct, arising out of his possession of, access to, and alleged intent to use the eftpos card of a client M, who was at the time a patient at a psychiatric hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("MHA").

[2] It is common ground that the practitioner was acting for M at the relevant times; that during that time M gave the practitioner his eftpos card and pin number, and that two tobacco purchases were made by the practitioner on behalf of M.

[3] The various allegations and supporting particulars are set out in full in the charge as laid and filed with the Tribunal. They are summarised as follows:

- (a) About 28 February 2012, M gave the practitioner his eftpos card and pin number, which the practitioner took so as to be able to use it to pay costs for legal work he had done or was going to do for M.
- (b) About 5 March 2012, Jennifer Anderson, a Deputy Inspector, appointed under the MHA telephoned the practitioner and was told, upon asking, that he had taken possession of M's eftpos card to pay his legal costs.
- (c) The practitioner later misled the Standards Committee in saying he had taken M's card and pin number in order to purchase tobacco supplies as requested by M without acknowledging he had taken it to pay legal costs.

- (d) In taking possession of the card and the information required to use it, the practitioner was in breach of the fundamental obligation of a lawyer under s 4(c) of the Lawyers and Conveyancers Act 2006 ("Act") to act in accordance with all fiduciary duties and duties of care and s 4(d) to protect the interests of his client.
- (e) Acting as a barrister for M at the time, was in breach of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 ("LCACC"), in particular rules 5.1, 5.2 and 14.2(e).
- (f) In giving his explanation for possession of the card, the practitioner misled the Standards Committee in breach of rules 10 and 11.1 of the LCACC.

[4] The practitioner denies the charge, and through counsel says that the evidence does not establish misconduct or the alternative charge of unsatisfactory conduct.

[5] A defended hearing took place in Dunedin on 19 August 2014 and at the conclusion of that hearing the Tribunal reserved its decision.

[6] This judgment records the decision of the Tribunal.

Background

[7] The practitioner first acted for M in 2004. On 29 January 2012, M sought assistance from the practitioner over the sale of his house by the Official Assignee, which M did not understand. The practitioner said he could assist in a limited manner but that a solicitor would be required, and also that the issues were unlikely to qualify for legal aid and fees were discussed. On inquiry the practitioner learned that M had been adjudged bankrupt on 26 July 2010.

[8] On 9 February 2012, due to concern about M's house being sold, the practitioner emailed Dr Fanshawe (the clinician responsible for M) to the effect that he needed to drive M into town to sign a legal document (a letter of engagement for

Jenny Guthrie, solicitor to act for M). Dr Fanshawe was not prepared to let M leave the facility and advised that M was wholly incompetent to make any legal decisions. On 10 February the practitioner drove Mrs Guthrie to the hospital to meet M so that she could deal with the issue of the house sale and his bankruptcy.

[9] On 13 February 2012 the practitioner was instructed by M in relation to M's mental health admission and on 28 February 2012 during a visit M asked the practitioner to purchase tobacco for him, saying no one else would, and proffered his eftpos card to the practitioner along with a written pin number.

[10] M also had complaints about the way he was being medicated and treated by staff and the practitioner advised him to contact Ms Anderson, the District Inspector of Mental Health. M phoned her that day but had forgotten why. Ms Anderson emailed the practitioner who responded, detailing his clients concerns about the treatment he was receiving and suggesting that she see M personally at a time when he was not unduly sedated, because, he said, M's memory was adversely affected by the medications administered to him.

[11] Ms Anderson saw M on 29 February 2012 and wrote notes including a note that said "gave card to [the practitioner] for him to pay bills - eftpos plus pin number".¹

[12] On 1 March 2012, during a telephone call, Ms Anderson took notes that M had said, *inter alia* that 'yesterday' he gave his card to the practitioner so that he could draw money out of the account to pay himself up to date, because he (the practitioner) was a bit short of funds and was shifting house that week. Ms Anderson also took notes: that the practitioner had evidently had a problem with a legal aid payment in the past and was waiting on such a payment still outstanding; that M told him straight that he had \$6,000 in a working account, topped up every fortnight; that M had confirmed the practitioner's problems with legal aid and recommended paying in cash privately; that M had asked the practitioner to take money out of his card to

¹ Bundle of Documents at 49 – 59.

pay for car storage and repairs; and that he had been *“termed as bankrupt [a] couple of months ago”*.

[13] Also on 5 March 2012, harbouring concerns about: the appropriateness of the practitioner holding M's eftpos card; the alleged taking of private fees rather than legal aid; and the apparent acting without an instructing solicitor, Ms Anderson consulted her colleagues at the district inspectors meeting she was attending. On advice she telephoned the practitioner, telling him what she had heard M say about his eftpos card and about legal aid. It is common ground that the conversation took place and that it was very short, because Ms Anderson was calling during a break in the inspectors' meeting. Ms Anderson and the practitioner dispute the version that each has given in evidence, regarding the content of that telephone conversation.

[14] Ms Anderson reported her version of the telephone conversation with the practitioner to the district inspectors meeting and, after advice, referred the matter to the National Director for Mental Health Services, Ministry of Health, Dr Crawshaw.

[15] On 6 March 2012 the practitioner purchased the tobacco for M and on 7 March went to visit M at the hospital, and delivered the tobacco. He did not return the eftpos card on this visit.

[16] On 8 March 2012 Ms Anderson (contacting M regarding a complaint he wished to lay about a staff member and medication) took the opportunity to ask M whether the practitioner had returned his eftpos card. M told her that he had not, but that the practitioner had bought him tobacco, filters and tissue papers and provided a receipt for these items. M said that he wanted the practitioner to hold on to the card in the meantime in case he (M) needed anything else.

[17] On 27 March 2012 Dr Crawshaw wrote a letter of complaint about the practitioner, to the New Zealand Law Society which in turn was forwarded to the Otago office of the Lawyers Complaints Service. The complaint alleged that M had given his card to the practitioner to pay outstanding legal fees and stated that a barrister is only permitted to act with an instructing solicitor and is prohibited from dealing with client funds.

[18] The Complaints Service wrote to the practitioner on 17 April 2012 enclosing a copy of the complaint against him from Dr Crawshaw.

[19] The practitioner responded with a comprehensive letter containing his version of events, which spans eleven pages, together with a copy of an instruction letter from a solicitor.

[20] This response from the practitioner was forwarded to Dr Crawshaw on 11 May 2012, who replied on 6 June 2012 that he would leave the matter in the hands of the Complaints Service to investigate.

[21] Ms Anderson telephoned M on 20 September 2012 and asked M about his eftpos card noting that his response was he had “*not got it back yet*”; that “*I got another one – he hasn’t taken any dollars out*”; and that he would “*get back when meet again*”.

[22] On 8 October 2012, at a meeting conducted by email, the Otago Standards Committee resolved to appoint an investigator to investigate the matters raised by the complaint from Dr Crawshaw. The investigator, Anne Stevens, a Dunedin Barrister, provided her report to the Lawyers Complaints Service on 5 November 2012.

[23] A copy of Ms Stevens’ report was sent to the practitioner on 28 November along with a request that any comments he had on the report be provided by 14 December 2012. The practitioner filed a further (third) response.

[24] The Standards Committee initially resolved to lay a second charge against the practitioner but on receiving advice from Ms Stevens in early November 2013, resolved not to proceed further in that regard.

[25] On 10 May 2013 the Otago Standards Committee determined that the complaints (including the abandoned complaint(s)) should be considered by the Disciplinary Tribunal under s 152(2)(a) of the Lawyers and Conveyancers Act 2006 and counsel were instructed to draft charges.

[26] Counsel for the Committee advised on 13 November 2013 that evidence was not available to support charges in relation to the now abandoned complaint and on 18 February 2014, formally preferred a single charge against the practitioner in respect of the instant matter before this Tribunal.

Submissions for the Standards Committee

[27] Counsel for the Standards Committee submits that:

- (a) The practitioner obtained possession of M's eftpos card and pin number in his capacity as a barrister, while doing legal work for M, so that the card could be used to ensure payment of legal fees that would be due to the practitioner.
- (b) The Committee acknowledged that the practitioner did not in fact use the card for that purpose or render an invoice for work which might have been paid for using the card but said that nevertheless this was the purpose for which the card was acquired.
- (c) In this regard, the practitioner was in breach of those sections of the Act and its Client Care Rules that are detailed in the particulars to the charge and at [3](d) and (e) above.
- (d) The evidence the Committee relies on to support its allegations is the evidence of Jennifer Anderson, District Inspector of Mental Health for Otago/Southland who says that when she spoke to the practitioner on 5 March 2012 about his having M's eftpos card, the practitioner was quite forthcoming in saying he had the card so that he could ensure outstanding legal fees were paid, and in that conversation the practitioner said nothing to her about having the card in order to buy "smokes" for M.
- (e) It is clear from the practitioner's evidence that at the time he obtained the card, he had been doing legal work for M for which he expected to

charge M privately as reflected in his having the patient complete a letter of engagement of 25 January 2012 indicating that the practitioner expected to be charging M at the rate of \$150 per hour plus GST.

- (f) The Tribunal is invited by the Committee to draw an inference that as a result of Ms Anderson's telephone conversation with the practitioner about the eftpos card, the practitioner would "*have well known that he was potentially in trouble as a result of having the card and for that reason was careful not to actually use it to obtain payment of legal fees*".
- (g) Proof of either the misconduct or unsatisfactory conduct charge is not dependent on establishing the particular reason as to why the practitioner had the eftpos card. It is not inherently improbable that the practitioner would have taken the eftpos card essentially as security for recovery of legal costs, given that he acknowledges having the card and pin number and acknowledges that at the time he was doing legal work for M and had intended to charge him privately for the work.
- (h) The case of Therese Sisson (no reference supplied) who was adjudged guilty of professional misconduct in charging a legally aided client privately, was applicable and drew a comparison between the alleged conduct of both Ms Sisson, and the practitioner in the instant case, in deliberately making a misleading statement to a Standards Committee.
- (i) The Tribunal be reminded as to what constitutes professional misconduct, referring to the judgment of the full court in *Complaints Committee No. 1 of the Auckland District Law Society v C²* and its approval of the test adopted by Kirby P in *Pillai v Messiter*, and that it is the nature of the conduct and not its consequences that determine whether professional misconduct has occurred.

² [2008] 3 NZLR 105 at [31].

Submissions for the Respondent

[28] Counsel for the practitioner submitted that:

- (a) The evidence did not establish unsatisfactory conduct, let alone misconduct.
- (b) The suggestion that the eftpos card was taken to pay fees is rebutted by the simple fact that it was established no bill had been rendered for the services relating to M's property and M was wrong in the statement he made to Jennifer Anderson that started the investigation. He submitted that it is obvious that a lawyer, anxious to be paid for past services, would render a bill.
- (c) There can be no dispute that the practitioner was entitled to render an invoice for the work he had done and that this is not a case of exploitation of a vulnerable client. It is clear that the practitioner went "the extra mile" for M.
- (d) The practitioner does not accept that an eftpos card is "money or valuable property" within the meaning of rule 14.2(e) of the Act and that the card had no value in itself, its significance being simply the use to which it is put.
- (e) The purchase of tobacco and other accoutrements for M, using his card was simply an act of kindness and did not form part of the practitioner's work as a barrister.

Discussion

[29] In her written and oral evidence, Ms Anderson was resolute in that:

- (a) When she phoned the practitioner on 5 March 2012 and told him what M had said about the practitioner having M's eftpos card and pin number, the practitioner made it clear to her that he needed M to pay his

outstanding legal fees and that he could not do any more work until those fees were paid.

- (b) The practitioner was quite forthcoming that this was the reason for him having the card, and not a reason that she had suggested.
- (c) In response to her query as to whether having the card was appropriate the practitioner said he accepted that it was unusual and this was the first time he had done something like this but it was because M was in the ward and there was no other way the practitioner could get paid.

[30] Other comments attributed to the practitioner in this conversation were in regard to legal aid for M for proceedings under the MHA; outstanding fees relating to other matters the details of which the practitioner refused to provide; the practitioner saying that M suffered from cognitive impairment caused by too many psychiatric drugs.

[31] The practitioner is equally resolute in that:

- (a) The purpose of taking the card was solely to provide tobacco supplies to M.
- (b) He did not use the card for any other purpose and did not take the card with any intention to use it to pay for legal work he had done or was going to do for M.

[32] The practitioner says that when he saw M (a 72 year old man of gentle disposition) on 28 February 2012 he was in a pitiful state with a black eye and had been assaulted by another patient. M said that he had run out of tobacco and could go into nicotine withdrawal. He asked the practitioner to buy tobacco for him because he could not leave the ward and was unable to get anyone else to buy it for him. The cost was more than \$50.00 and M offered his eftpos card. The practitioner says that he saw this as the same as if M had given him money to buy tobacco and did not see that as a breach of his professional obligations.

[33] The practitioner says that M had arrangements with the Credit Union in order to pay accounts and that they would issue cheques on M's request.

[34] In relation to the telephone conversation with Ms Anderson, the practitioner says:

- (a) The conversation started with Ms Anderson saying alarm bells had gone off and asked him about the eftpos card and whether it was appropriate to have it.
- (b) He told her he did have the card and had not accessed it and accepted that it was unusual for him to have the card. He felt Ms Anderson was being intrusive as she was enquiring into a personal arrangement with M where he would purchase tobacco for M and he did not feel under any obligation to tell Ms Anderson that was the purpose for having the card.
- (c) Ms Anderson asked him about his instructions and whether he was acting on legal aid and if not why not. He told her he had legal aid for the mental health matters only and Ms Anderson asked what his instructions were in relation to matters other than mental health. He felt that he could not answer the question without breaching M's confidentiality.
- (d) Ms Anderson asked if M was a bankrupt and suggested that the fact that M was would mean entitlement to legal aid for non-mental health matters. He felt she was implying that he was taking advantage of a vulnerable person, that this was an unfair implication, that legal aid would not be available for the work done and that Ms Anderson did not know the nature of that work and could not therefore have a valid opinion.
- (e) Ms Anderson returned to the appropriateness of holding the eftpos card and said that he could use the card to obtain legal fees. He agreed with the proposition on the basis that he had the card and pin number but it

was a theoretical discussion only as he had no outstanding fees because M had not been invoiced.

- (f) He was becoming annoyed at this stage and posed a theoretical scenario based upon the inability to obtain fees from a person such as M who was detained but had funds. He also made a theoretical comment that M would have to pay legal fees for completed work if he wanted him to do new legal work, theoretical because there was no legal work that M wanted him to do.
- (g) Ms Anderson never directly asked him why he had the card and so it was never made clear in the conversation that he had accepted it on the sole basis of using it to purchase tobacco for M and he had no authority to use it for any other purpose. All he said was that he had the card for “other things” because he considered it was none of her business.

Were the Practitioner and Ms Anderson at cross-purposes?

[35] The Tribunal is faced with a conflict of evidence which requires resolution before determining whether in its opinion, on the balance of probability, misconduct or unsatisfactory conduct has been proven.

[36] According to the evidence the conversation between Ms Anderson and the practitioner was short. Ms Anderson made the telephone call during a break in a district inspectors meeting and told the practitioner she did not have a lot of time. The notes Ms Anderson took during the call are few indicating a short conversation.³

[37] The telephone call seems to have deteriorated into an acrimonious conversation where the practitioner clearly took umbrage to what he was hearing from Ms Anderson because he felt his integrity was being impugned and he did not give direct answers to questions during the latter part of the call. In saying this we acknowledge that it is for the practitioner to protect client confidentiality.

³ Bundle of Documents at 53.

[38] Ms Anderson did not tell the practitioner what M had said about giving his eftpos card so that legal fees could be taken, denying him the opportunity to rebut that and herself the opportunity to gather more information prior to taking any action that was indicated.

[39] Consequently, we believe that the practitioner and Ms Anderson were talking at cross-purposes during the telephone conversation of 5 March 2012.

For what purpose or purposes did the Practitioner have M's card?

[40] No complaint about the practitioner was made by M and there is no direct evidence from M in respect to any of the allegations of the Standards Committee.

[41] Under cross-examination Ms Anderson agreed that she did not tell the practitioner that M had claimed he had the eftpos card for legal fees. She said that she did not tell him because he admitted it. Ms Anderson was asked why she had not recorded in her notes this 'admission', given that the complaint against the practitioner relied on a direct admission that he had the card for the payment of legal fees. Her response was that she had noted that Mr Rayner would not do other work unless his bills were paid and that *"there was no other way that he thought he could get paid other than getting the eftpos card off M and getting funds that way"*. To the suggestion from counsel for the practitioner that he was not asking for the inferences which Ms Anderson drew from what the practitioner said, but was asking for what he actually said, she responded that she didn't know why else she would have put that in her notes.

[42] During oral evidence the Tribunal asked Ms Anderson if she had formed a view as to the reliability and accuracy of statements and responses made to her by M. She responded that there were consistencies in some things that were said with what the practitioner acknowledged and that she thought the statements were accurate.

[43] With the exception of telling Ms Anderson that the practitioner had his eftpos card and pin number, there is no evidence that suggests that any of the other

information M gave Ms Anderson, either voluntarily or in response to questions, was accurate. The practitioner was moving house but was not short of funds. He was not going to, and did not organise M's vehicle storage charges to be paid; he did not pay "bills" for M at Green Island; and he did not have any problem with legal aid.

[44] There is no evidence to show that, with the exception of the tobacco supply purchases, any money had been taken from M's eftpos card by the practitioner.

[45] There is no evidence to show that the practitioner was short of funds and no evidence that he had a problem with or any outstanding costs in respect of legal aid.

[46] There is no evidence that the practitioner had invoiced M for private fees.

[47] What does seem evident to the Tribunal is that Ms Anderson, after her 5 March 2012 conversation with the practitioner, and believing in the reliability and accuracy of information gleaned from M went ahead with a complaint that was based upon incorrect information and upon inferences drawn from responses she received from M and the practitioner.

[48] In the view of the Tribunal the practitioner's actions in relation to the proposed sale of M's house by the Official Assignee is a positive example of a practitioner trying to fulfil his fundamental obligations to his client, particularly the duty of care and the obligation to act in the best interests of his client.

[49] The Standards Committee invites the Tribunal to draw the inference that the only reason the practitioner did not ultimately draw fees from M's card was because of the phone call from Ms Anderson alerting him that he was in trouble as a result of possession of the card.

[50] We draw no such inference. We find that the practitioner took possession of M's eftpos card at the request of M for the sole reason of purchasing tobacco supplies for M and for no other reason.

[51] In making the above determination the Tribunal finds that the practitioner did not mislead the Standards Committee in breach of rules 10 and 11.1 of the LCACC which require variously that:

“10 A lawyer must promote and maintain proper standards of professionalism in the lawyer’s dealings.

And

11.1 A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer’s practice.”

Did possession of the card breach rule 14.2 LCACC?

[52] Rule 14.2(e) LCACC reads:

“14.2 A lawyer who holds a practising certificate as a barrister sole must not

(e) receive or hold money or other valuable property for and on behalf of another person”.

[53] The practitioner on his own admission was holding M’s eftpos card for the reasons already set out. David More, Barrister and Convenor of the Otago Standards Committee gave evidence that it was unacceptable for the practitioner to have done so.

[54] Counsel for the practitioner canvassed whether, in any circumstances, the use of M’s eftpos card to purchase tobacco would be acceptable. Mr More responded that had the practitioner taken the credit card off M; gone over the road to a shop; purchased the tobacco required and then gone straight back and returned the card, the Standards Committee would have had no issue. The Committee’s concern was that Mr Rayner did not return the card immediately.⁴

⁴ See Transcript (page 7, line 27 and following).

[55] The practitioner, under cross-examination by counsel for the Committee advised that the tobacco supplies requested by M were a special brand not available locally and necessitated a trip into town and back.

[56] The inference drawn by the Tribunal from Mr More's responses is that it is a matter of longevity. The fact that the practitioner held on to the card, rather than returning it straight away, caused the alleged breach of rule 14.2(e) of the LCACC.

[57] Strictly speaking, it was imprudent of the practitioner to accept M's eftpos card in order to run an errand because, even though he was acting outside his professional role, he could not divorce himself from being M's barrister having just visited M in that capacity. That opened his actions up to the very type of allegations that eventuated. On the other hand we believe that it was an understandable human reaction, given the circumstances that the practitioner found his long-standing, respected client in, to carry out a simple, lawful request in the nature of a kindness.

[58] The Tribunal finds that the practitioner did not breach rule 14.2(e) of the LCACC.

[59] Consequently, for all the above reasons the charge of misconduct in his professional capacity is dismissed.

[60] Finally, we address the alternative charge of unsatisfactory conduct. The Standards Committee say that if the Tribunal finds that the practitioner's conduct does not amount to professional misconduct, which we have found, then the practitioner's conduct is unsatisfactory conduct in terms of ss 12(b) and (c) of the Act, which in summary read respectively:

"12(b) conduct of the lawyer...that occurs at a time when he...is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable..."

(c) conduct consisting of a contravention of this Act [the Act], or of any regulations or practice rules made under this Act that apply to the Lawyer...or of any other Act relating to the provision of regulated services..."

[61] The Tribunal does not accept that on the same set of facts for which we have found the charge of professional misconduct not proven, the conduct of the practitioner meets any lower threshold that would amount to unsatisfactory conduct.

[62] Having determined that the practitioner's conduct would not be regarded by lawyers of good standing as being unacceptable, and that the practitioner has not contravened the Act or its rules, the alternative charge of unsatisfactory conduct is dismissed.

Costs

[63] The Tribunal proposes that costs should lie where they fall. If either party wishes to be heard on costs, then each should file submissions. The applicant should file within 10 working days of this decision. The respondent should file within 5 days thereafter.

DATED at AUCKLAND this 3rd day of October 2014

BJ Kendall
Chairperson