

**ORDER MADE FOR NON-PUBLICATION OF NAMES AND PARTICULARS**

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

[2014] NZLCDT 77

LCDT 013/14

**BETWEEN**

**WAIKATO BAY OF PLENTY  
STANDARDS COMMITTEE No. 2**

Applicant

**AND**

**A PRACTITIONER**

Respondent

**CHAIR**

Judge BJ Kendall (retired)

**MEMBERS OF TRIBUNAL**

Mr W Chapman

Mr C Lucas

Mr K Raureti

Mr P Shaw

**HEARING** at Hamilton

**DATE** 22 October 2014

**COUNSEL**

Mr M Hodge for the Standards Committee

Mr P Morgan QC for the Respondent

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

[1] The practitioner faces two charges brought by the applicant under the Law Practitioners Act 1982 each of which alleges misconduct in his professional capacity.<sup>1</sup> On each charge he faces alternative charges of negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practice as a barrister or solicitor or as to bring the profession into disrepute.<sup>2</sup> On each charge there is a further alternative charge of conduct unbecoming a barrister or solicitor<sup>3</sup>.

[2] Full details of the charges and the particulars of each charge are attached as Appendix A.

[3] The practitioner defended the charges. A hearing took place in Hamilton on 22 October 2014 at the end of which the Tribunal reserved its decision.

***Background to the charges***

[4] Mr and Mrs X bought a property in Y in 2001. They bought a further property in Z in 2002. Both properties were transferred to their Family Trust of which both were trustees and beneficiaries.

[5] In 2004 Mr X and his brother B with another formed a company known as X Y Limited (XY). Mrs X was neither shareholder nor director of XY and the Family Trust had no interest in it.

[6] On 30 September 2005, the practitioner became a trustee of the Family Trust. This came about because the then independent trustee of the Family Trust declined to execute certain documents relating to a transaction with Nationwide Finance. The

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<sup>1</sup> Section 112(1)(a) of the Law Practitioners Act 1982.

<sup>2</sup> Section 112(1)(c).

<sup>3</sup> Section 112 (1)(b).

transaction involved a number of documents included in which were a second mortgage over the Z and Y properties, a Deed of Guarantee and Indemnity from the trustees of the Family Trust and personal covenants from Mr and Mrs X and B. The practitioner said that he did not recall being given an explanation why the independent trustee declined to execute the documents.

[7] On 24 February 2006, AB Limited (AB) agreed to lend \$396,149.70 to XY. Mr and Mrs X and the practitioner guaranteed the loan as trustees of the Family Trust. The Family Trust provided second mortgages over the Z and Y properties in favour of AB. The practitioner's liability was limited to the Family Trust's assets. Mr and Mrs X also provided personal guarantees.

[8] The practitioner acted for all parties to the transaction namely the lender AB, the borrower XY and the Family Trust and its trustees as guarantors and mortgagors. He also acted for Mr and Mrs X in their personal capacity as guarantors. He had a general retainer which required him to advise all parties on all aspects of the transaction including its risks and wisdom.

[9] The practitioner obtained a Waiver of Independent Legal Advice from Mrs X.

[10] On 21 December 2007 the AB loan was refinanced. It entered into a further loan agreement with XY in the sum of \$562,809.68. Mr and Mrs X and the practitioner provided guarantees in their capacity as trustees of the Family Trust and personally as well. The Family Trust agreed to provide second mortgages in favour of AB over the Z and X properties. The practitioner's liability as trustee was limited to the assets of the Family Trust while the liability of Mr and Mrs X was not so limited.

[11] The practitioner acted for all parties as he did in respect of the transaction of 24 February 2006 detailed in paragraph [7]. The practitioner did not see the transaction through to completion. Not all of the documents were signed at the practitioner's office on the 21 December 2007. There is a dispute about some of the signatures. Mrs X also denies ever having met the witness to her signature who was not the practitioner. The meeting on that day is said to have ended in acrimony

between the parties. Mrs X left. Her signature was not obtained to the Waiver of Independent Advice document that had been prepared for her to sign. The practitioner witnessed the signature of Mr X on the guarantee and signed a number of deletions. He then handed the documents to Mr X to take them to discuss with AB. He did not attend to the registration of the security documents.

[12] XY subsequently failed. AB issued Mrs X, her husband and B a default notice under the Property Law Act in October 2008. The default notice required repayment of \$594,434.38.

[13] Mrs X's husband moved to [overseas] in 2008 and was declared bankrupt in 2011. In the same year B was imprisoned for fraud and forgery offences unrelated to the transactions described herein. Mrs X and Mr X have divorced. Mrs X was forced to sell the Z property to meet XY's obligations to the first mortgagee. She refinanced the Y property, moved out of it and rented it out to address XY's AB loan. She now lives with her mother, is eight years out from retirement, and finds herself in a precarious financial position.

### ***The central issue***

[14] Counsel for the practitioner informed the Tribunal that there was no real dispute about the transactions that occurred and that they have been correctly described by counsel for the Committee. He agrees with the submission of the Committee that it is the adequacy of the waiver and the surrounding advice and attendances which is very much in issue in this case<sup>4</sup>.

### ***The complainant's evidence***

[15] Mrs X swore an affidavit on 25<sup>th</sup> March 2014. In that she describes going to the practitioner's office in February 2006 to meet about the February transaction between AB and XY. She makes the following points:

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<sup>4</sup> Paragraph 2.8 of Standards Committee's opening submissions and paragraph 16.0 of counsel for practitioner's opening submissions.

- (a) She stated to the practitioner in the presence of her husband and brother-in-law that she was not happy about signing up to anything because the brother-in-law was not providing any security.
- (b) That she left the meeting and on return was told she was to be given 5% from each of her husband and B if she signed the documents.
- (c) That she signed the documents presented to her because she was under pressure from her husband and brother-in-law; for the sake of her marriage which was under strain; and for her husband and B as brothers.
- (d) That she signed the documents not understanding what they were about or what the transaction was about. She thought the security the Trust was providing was a caveat, which to her meant that if she and her husband wanted to sell one of the properties, agreement would have to be reached first with AB.
- (e) That it all seemed harmless to her because she had no intention of selling the properties. She had no idea, and it was never explained to her, that the Trust was granting second mortgages over its properties and that it could end up losing the properties. Had she understood that, she would never have signed the documents.
- (f) That the practitioner drew her attention to one document in particular but did not explain what it was. She did read it and commented to the practitioner "*looks like you have got your butt covered*". She later learned that it was a Waiver of Independent Legal Advice.
- (g) That she did not know and did not have it explained to her what the implications of the document were.
- (h) That she was not given a copy of the document contrary to what was stated in the waiver document.

- (i) That the only involvement she had in the 2006 transaction was the signing of documents at the practitioner's office. Neither he nor any of his staff met with her beforehand, either on the day or prior to, to explain the transaction and the documents that she was required to sign. No one provided her with explanations when she was signing the documents.

[16] Mrs X who is the complainant was questioned by Mr Morgan QC, counsel for the practitioner. She acknowledged that she had worked with her husband in [overseas] working for a development company engaged in the building and sale of townhouses and units.

[17] They returned to New Zealand to engage in property development. It was her husband's dream to be in business on his own account. In 2005, he linked up with C D of AB and commenced a development in V for the building of apartments and sale.

[18] They purchased as well two sections in E F, a new subdivision in G, with the intention of building houses for resale. The practitioner acted for them on the purchase and also in proceedings where they were sued because they were unable to finally settle the transactions. That was in October 2006. Mrs X acknowledged that she had a primary role in the matters although she had earlier replied to Mr Morgan that she was never primary in anything, merely following her husband.

[19] Mrs X acknowledged that she had signed documents prior to the February 2006 transaction with AB. In September 2005, there was a transaction with Nationwide Finance for the provision of a revolving credit facility to X Y the limit of which was \$1,985,550. Included in the documentation was a Waiver of Independent Legal Advice which Mrs X signed.

[20] There was a further transaction in October 2005 whereby ANZ National Bank provided additional finance to the Trust totalling \$435,451.56. Included in the documents which Mrs X signed was a Waiver of Independent Legal Advice.

[21] Then there was the AB transaction of February 2006 which has been the subject of charge one. Mrs X signed a Waiver of Independent Legal Advice.

[22] There was a transaction in respect of G H I J Limited (a X family associated company) involving a guarantee to ANZ National Bank. This occurred in September 2007 and again Mrs X signed a Waiver of Independent Legal Advice.

[23] The practitioner acted for all parties on all of the transactions and it was for that reason that he obtained Waivers of Independent Legal Advice.

[24] Mrs X told Mr Morgan that at best she could not recall anything. She did not remember anything until she had read what the practitioner had said in his affidavit. She said that having read the affidavit she understood about the change of trustee.

[25] She understood that the Nationwide transaction was a major loan. She said that she and her husband sat and listened to what the practitioner explained about the transaction but does not recall what was said. She said that she has no recall of having the documents which she signed explained to her. She acknowledged that her memory is not great and agreed that there was a willingness on her part to support her husband.

[26] Mrs X said that her understanding in respect of the ANZ credit facility of \$435,000 was that it was refinancing and that she was guaranteeing the loan. She said that the practitioner did not explain the transaction to her and no other person did. She was just doing what her husband did.

[27] In respect of the AB transaction of February 2006, Mrs X said that she knew it was for financing the development project at V by X Y. She said that she signed the documents after commenting to the practitioner that he was 'covering his butt'.

[28] After the collapse of X Y and the failure of her marriage, she consulted a lawyer in 2012. She said that it was only then that she first realised what a waiver was.

***The practitioner's evidence***

[29] The practitioner swore an affidavit in reply dated 26<sup>th</sup> May 2014 in which he made the following points:

- (a) Mrs X's then husband uplifted all of his firm's files in respect of the X Y development in May 2008 which has consequently made it difficult for him to recall events after some six to eight years of their happening.
- (b) He has been able to rely on his actual memory of some events and to refresh his memory in respect of others from documents he has been able to locate.
- (c) That he is able to depose to some of the events because of the invariable practice of his firm which is carried out by him and his staff. His invariable practice is to make handwritten notes and keep them on file. It is those notes which have been lost to him arising from the uplifting of his files by Mr X.
- (d) Having described the Nationwide transactions, he said that he discussed the nature of the transaction proposed and that in the case of Mrs X and her husband he likely did so when both were present and in the presence of his staff solicitor I J.
- (e) That Mrs X was aware at that time of the conflict between the parties in the Nationwide transaction, clearly consented to his firm acting on her behalf having been advised by him but also by reason of the fact that the independent trustee of the Trust would not execute the finance documents. The practitioner had earlier said that he had no recall of being given an explanation as to why the then trustee would not execute the documents. (refer paragraph [6] above).
- (f) That the invariable procedure followed in his practice in respect of the 2005 transaction and in respect of any of the transactions that occurred



afterwards was that his staff solicitor I J actually read the waiver out to Mrs X. He then says that he explained in blunt easily understood language what it meant and ensured that the explanation was understood.

- (g) That Mrs X did have the advice given to her as recorded in the Waiver of Independent Legal Advice document on every occasion that she signed it.
- (h) That the transactions that Mrs X now complains of represented a chain of financing transactions which she was involved in and that as a matter of practice she:
  - (i) Had a full explanation of the transactions given to her together with the implications of the transactions upon the Trust and her personally. The explanation would have addressed issues regarding default, mortgagee sale and bankruptcy, and also identified the conflict of interest.
  - (ii) Was advised to obtain independent legal advice.
  - (iii) Was read the Waiver of Independent Legal Advice which incorporated her consent to his acting for multiple parties including her;
  - (iv) Having waived the opportunity, she executed the security documents and the waiver.

[30] I J was the senior staff solicitor of the practitioner. In her affidavit sworn on 10th June 2014, she said that she was a diligent note taker and that without them she can remember little of the transactions involving the Xs.

[31] She does recall having met with Mrs X and her husband on more than one occasion to execute documents. She explained how she generally conducted such matters as being:

- (a) Sending a full copy of the documents to the client prior to the meeting if time allowed.
- (b) Prepare all supporting documents beforehand so that they could be signed at the same time.
- (c) When meeting the client outlining the nature of the transaction and how the documents would fit in with the transaction.
- (d) Drawing the client's attention to the nature of the document and explaining its implications before executing each document.
- (e) She applied that approach to all documents including waivers.

[32] Ms J witnessed the documents for the AB transaction of February 2006. She said that she did not have any recall of any problems or any resistance or discomfort from any of the parties. She has no recall of anything that Mrs X had to say about the transaction.

[33] Ms J said that she can be certain about the ANZ transaction of September 2007. She noted that she signed the certificate that she had explained to Mrs X the nature and effect of the guarantee and that Mrs X had acknowledged her understanding of it and her agreement to its terms. She said that she did not sign such certificates lightly. Because she had given the certificate she was certain that she did explain the nature and effect of the guarantee to Mrs X and that she did acknowledge to her that she understood what was being said and agreed to the terms of the agreement.

[34] Under cross-examination the practitioner said that the explanation he gives to clients about the nature and implications of the transactions and the documents to be executed is now more fulsome than previously. He did not agree that the advice that had been given to Mrs X was inadequate given that he had earlier referred her to the then independent trustee.

[35] The practitioner said that he did not give prior written advice about the transaction(s), their nature and implications.

### ***Discussion***

[36] The Tribunal has to resolve the clear conflict in the evidence of the complainant and the practitioner.

[37] When it considers the complainant's evidence it has taken into account that:

- (a) She has acknowledged that her memory is "not great".
- (b) That she said that she had no recall of events until she was reminded of matters that the practitioner set out in his affidavit.
- (c) She had involvement in a series of transactions involving X Y, the signing of multiple documents and the signing of a waiver document on at least four occasions.
- (d) That she had expressed that she was committed to go along with what her husband was doing.
- (e) That she had been involved in numerous property transactions prior to the X Y matters such that she did have an understanding of mortgages, guarantees and similar documents.
- (f) That her recall has to be considered as selective when the Tribunal heard that she was able to comment to the practitioner that he was protecting his own interests and then saying that the practitioner did not give her explanations about the meaning and implications of the transactions and documents.
- (g) That she denied that events had happened even when documents signed by her and witnessed stated the contrary.

[38] The practitioner acknowledges a disadvantage in that his file notes are no longer available to him. He has had to rely in large part on his invariable practice which he has described. He is supported in that by I J.

[39] There is as well the evidence of the documents that Mrs X has signed. The Tribunal considers that it would have to have compelling evidence before it before it could hold for the complainant and her evidence.

[40] The Tribunal accordingly has decided that the evidence of the practitioner has to be preferred.

[41] It follows that the charge of misconduct in relation to the February 2006 transaction fails.

[42] Counsel for the Committee submits that, even if the evidence of the practitioner is accepted, his conduct was still short of acceptable standards. In that event one of the lesser alternatives will be established.

[43] In support of that contention he submitted that:

- (a) The practitioner having recognised the conflict failed to give written advice of:
  - (i) Who it was he was acting for.
  - (ii) The nature of the conflict.
  - (iii) The reality of the conflict.

[44] Counsel submitted that the practitioner did not tell the client about the position she was being put in and that by looking at the evidence and waiver document he had taken a mechanical approach to the waivers and did not address the nature of the conflict.

[45] Counsel for the practitioner responded that the practitioner's evidence having been accepted, then his conduct did meet acceptable standards. A generalization of the kind now advanced by the Committee would not meet the tests for negligence or incompetence or conduct unbecoming.

[46] The recognised test for negligence or incompetence is that the negligence is of a degree that tended to affect the good reputation and standing of the legal profession generally, in the eyes of reasonable and responsible members of the public. It would involve conduct which members of the public would regard as below the standards required of a law practitioner, and that the nature of the conduct would be accepted as such by responsible members of the profession.<sup>5</sup>

[47] The test for conduct unbecoming is whether the conduct is acceptable according to the standards of "*competent, ethical and responsible practitioners*".<sup>6</sup>

[48] The waiver document is annexed as Appendix B. The Tribunal notes that the complainant signed it on four separate occasions. It is comprehensive. It addresses the complainant's liability. It explains the nature of the complainant's liability in nine sub paragraphs.

[49] Paragraph [3] is important in that it spells out why the complainant should take independent legal advice, but records waiver of the right to seek such independent legal advice.

[50] The Tribunal accepts the argument of counsel for the practitioner that the conflicted lawyer who gives the advice about conflict which is acknowledged and who has explained the waiver has done everything that is expected of that practitioner.

[51] The Tribunal accordingly finds that the practitioner has not been guilty of the alternative charges.

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<sup>5</sup> *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514 at [91].

<sup>6</sup> *R v Medical Council* [2005] 3 NZLR 810 at 811.

***The second charge***

[52] This charge relates to a transaction said to have taken place on 21 December 2007 and specifies particulars substantially the same as detailed in respect of the first charge. The theme of lack of advice, attendance and surrounding involvement is the same as for charge one.

[53] There is a dramatic difference. The complainant did not sign the waiver document. There is doubt about whether or not she signed the security documents and the witnessing of them. There is suspicion about signatories as executing the documents and the witnessing thereof. What is clear is that the practitioner did not complete the transaction. The areas of doubt are not a reflection on the practitioner nor are they his responsibility.

[54] The Tribunal accordingly finds that charge two is not proved.

[55] Accordingly, the Tribunal further finds that costs should lie where they fall.

***Amendment of particulars***

[56] The applicant asked for amendment of the particulars of the charges at the commencement of the hearing. The respondent opposed the amendments.

[57] At the conclusion of the hearing, the Tribunal considered the application. It decided to allow the amendments which are tracked and are attached as Appendix C.

[58] Having regard to the final decisions of the Tribunal in respect of both charges, they have little consequence other than to fill out the detail upon which the applicant has relied.

**DATED** at AUCKLAND this 27<sup>th</sup> day of November 2014

BJ Kendall  
Chairperson

**ADDENDUM – NON PUBLICATION ORDER**

The Tribunal notes that counsel agree and find that it is proper, having regard to the interests of the practitioner and the complainant, including the privacy of the complainant and having regard to the public interest, to make and hereby makes an order pursuant to s 240, prohibiting the publication of the name or any particulars of the affairs of the complainant and the practitioner.

**DATED** at AUCKLAND this 10<sup>th</sup> day of December 2014

BJ Kendall  
Chairperson

## CHARGES

Waikato Bay of Plenty Standards Committee (**Committee**) hereby charges A Practitioner (**Practitioner**) with:

### **First charge**

Misconduct in his professional capacity, pursuant to section 112(1)(a) of the Law Practitioners Act 1982 (**Act**);

Or, in the alternative:

Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to bring the profession into disrepute, pursuant to s112(1)(c) of the Act;

Or, in the alternative:

Conduct unbecoming a barrister or solicitor, pursuant to section 112(1)(b) of the Act.

The particulars of the charge are as follows:

- 1 At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practising certificate.
- 2 The complainant in this matter is S X (S). In 2001, S and her husband T X (T) bought a property in Z. In 2002, they bought a property in Y. They put both of these properties into the X Family Trust (**Trust**), of which they were trustees and beneficiaries.
- 3 In 2004, T and his brother B X (B), together with C D of AB Limited (AB), formed X Y Developments Limited (XY). T and B were directors of XY. The shares were held in two equal parcels: one between T and B, and the other between T and the Practitioner. S was neither a director of, nor a shareholder in, XY.
- 4 On 30 September 2005, the Practitioner became a trustee of the Trust.
- 5 On 24 February 2006, AB agreed to lend \$396,149.70 to XY. S, T and the Practitioner guaranteed the loan in their capacity as trustees of the Trust. The Trust provided by way of security second mortgages in favour of AB over its Z and Y properties (ANZ held the first mortgages.) The Practitioner's liability was limited to these Trust assets, but S and T's liability was not limited in that way.
- 6 The Practitioner acted for all parties to this transaction, including AB as lender and mortgagee, XY as borrower, and the Trust and its trustees as guarantors and mortgagors. The Practitioner's retainer was a general retainer, which required him to advise on all aspects of the transaction, including its risks and wisdom.



- 7 The Practitioner recognised that a conflict of interest existed between S and the other parties to the transaction and obtained a waiver of independent advice from her.
- 8 Rule 1.04 of the then applicable Rules of Professional Conduct stated that “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.” In order to obtain the prior informed consent of a client where rule 1.04 applies, a practitioner must:
- (a) Recognise the conflict or the possibility of one;
  - (b) Explain to the client what that conflict is;
  - (c) Explain to the client the ramifications of that conflict;
  - (d) Ensure that the client has a proper appreciation of the conflict and its implications; and
  - (e) Obtain the informed consent of the client to act for him or her.
- 9 Here, although the practitioner recognised that a conflict of interest existed between XY and S and obtained a waiver of independent legal advice from S, he failed to obtain S's prior informed consent before acting for all parties to the transaction. The Practitioner failed to provide S with timely and comprehensive advice on the nature of the conflict, the limitations it would place on his ability to advise her about the transaction and its risks, and the nature and risks of the transaction itself, and to ensure that she understood that advice.

### **Second charge**

Misconduct in his professional capacity, pursuant to section 112(1)(a) of the Act;

Or, in the alternative:

Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to bring the profession into disrepute, pursuant to s112(1)(c) of the Act;

Or, in the alternative:

Conduct unbecoming a barrister or a solicitor, pursuant to s112(1)(b) of the Act.

The particulars of the charge are as follows:

- 1 On 21 December 2007, AB entered into a further loan agreement with XY, this time lending it \$562,809.68. S, W and the practitioner provided guarantees in their capacity as trustees of the Trust. The Trust provided by way of security second mortgages in favour of AB over its Z and Y properties. The Practitioner's liability as a trustee was limited to these Trust assets, but S and T's liability as trustees was not limited in that way. S and T also provided personal guarantees.
- 2 Again the practitioner acted for all parties to the transaction, at least initially. He acted for AB as lender and mortgagee, XY as borrower, the Trust and its trustees as guarantors and

mortgagors, and S and T personally. The Practitioner's retainer was a general retainer that required him to advise on all aspects of the transaction, including its risks and wisdom.

- 3 On this occasion the Practitioner only partially attended to execution of the documents relating to the transaction. The Practitioner did not obtain a waiver of independent legal advice from S before acting for her. S expressed unease to the Practitioner about entering into the transaction and the Practitioner engaged in negotiations with S, T and B to try to address S's concerns.
- 4 Rule 1.04 of the then applicable Rules of Professional Conduct stated that "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." The requirements for prior informed consent are outlined in paragraph 8(a)-(e) of charge one, and are relied on in this charge.
- 5 Here the practitioner again failed to obtain S's prior informed consent before acting for all the parties to the transaction. In addition to the failures identified in paragraph 9 of charge one (which are also relied on in this charge), the Practitioner also failed to:
  - (a) Advise S to seek independent legal advice and to obtain a waiver of such advice from her prior to acting for her;
  - (b) Explain to S the significance of, and risks involved in, providing a personal guarantee; and
  - (c) Advise S to seek independent legal advice after she expressed unease about entering into the transaction. To the contrary, the Practitioner continued to act for S and engaged in negotiations with S, T and B to try to address S's concerns.
- 6 XY failed and in October 2008 AB issued S, T and B a notice under the Property Law Act on S, T and B informing them that they had defaulted on their repayment obligations and requiring them to repay \$594,434.38. In 2008 T moved to [overseas] and in 2011 he was declared bankrupt. That same year B was imprisoned for various fraud and dishonesty offences unrelated to XY's ventures. S was eventually forced to sell the Z property and to refinance the Y property to discharge the debts.

**WAIVER OF INDEPENDENT LEGAL ADVICE**

TO: A PRACTITIONER  
SOLICITORS  
[TOWN]

I S X as trustee of the X FAMILY TRUST being a proposed Guarantor pursuant to a Deed of Guarantee in favour of AB Limited ("the Bank") for advances to X Y LIMITED ("the Company") (with an unlimited liability) HEREBY ACKNOWLEDGE:

- 1 THAT I have been advised that as you act for the Company I should seek independent legal advice.
- 2 THAT I have received a full explanation of the implications of my guaranteeing the debts of the Company in favour of the Bank. You have explained to me that:
  - (a) I will be equally liable for all the obligations under the loan as if I was the borrower.
  - (b) The guarantee is joint and several with the other guarantors which means that I could be called upon to pay the full amount owing to the Bank and would then have to try and recover from the other guarantors.
  - (c) The loan is "upon demand" which means that it can be called up at any time, although this is normally done on default, and the Bank can then immediately call on me to pay the amount then owing to the Bank even if the Company may itself still be in a position to pay.
  - (d) The loan arrangements with the Company may be altered without the necessity for the Bank to give notice to me and the other guarantors.
  - (e) If the Company itself gives or has given a guarantee in respect of another company or person this may extend my liability over and above the specific advances made to the Company of which I am aware.
  - (f) If at any time there is more than one borrower this guarantee will cover the indebtedness of each and every borrower.
  - (g) The guarantee will only be released once all the amounts owing by the Company and its other obligations to the Bank have been paid or met and even then the release will not be automatic so that I must make specific request to the Bank to obtain a release to avoid any ongoing liability.
  - (h) If I grant or have granted a mortgage to the Bank over a property that mortgage will also become security for my obligations under this guarantee.

(i) If I have or later open any account with the Bank it could deduct amounts owing under this guarantee from my account by way of set-off.

3 THAT having considered this advice and the implications of my guaranteeing the loan and having been advised again that because of those implications and because there may be other personal factors of which you, as solicitor to the Company, may not be aware I should obtain independent legal advice, I nonetheless waive my right to such independent legal advice.

4 I RECORD that I am under no pressure to proceed or to waive independent legal advice and I have been offered the opportunity of considering the matter at my leisure before signing this waiver.

5 I REQUEST that you act on my behalf in relation to this guarantee as well as on behalf of the Company concerned and the other directors.

6 I CONFIRM that I have received a copy of this Waiver.

DATED this                      day of    2007

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S X

## AMENDMENTS TO CHARGES WITH TRACKED CHANGES

Waikato Bay of Plenty Standards Committee No. 2 (**Committee**) hereby charges A Practitioner (**Practitioner**) with:

### **First charge**

Misconduct in his professional capacity, pursuant to section 112(1)(a) of the Law Practitioners Act 1982 (**Act**);

Or, in the alternative:

Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to bring the profession into disrepute, pursuant to s112(1)(c) of the Act;

Or, in the alternative:

Conduct unbecoming a barrister or solicitor, pursuant to section 112(1)(b) of the Act.

The particulars of the charge are as follows:

- 10 At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practicing certificate.
- 11 The complainant in this matter is S X (S). In 2001, S and her husband T X (T) bought a property in Z. In 2002, they bought a property in Y. They put both of these properties into the X Family Trust (**Trust**), of which they were trustees and beneficiaries.
- 12 In 2004, T and his brother B X (B), together with CD of AB Limited (AB), formed X Y Limited (XY). T and B were directors of XY. The shares were held in two equal parcels: one between T and B, and the other between T and the Practitioner. S was neither a director of, nor a shareholder in, XY.
- 13 On 30 September 2005, the Practitioner became a trustee of the Trust.
- 14 On 24 February 2006, AB agreed to lend \$396,149.70 to XY. S, T and the Practitioner guaranteed the loan in their capacity as trustees of the Trust. The Trust provided by way of security second mortgages in favour of AB over its Z and Y properties (ANZ held the first mortgages.) The Practitioner's liability was limited to these Trust assets, but S and T's liability was not limited in that way.
- 15 The Practitioner acted for all parties to this transaction, including AB as lender and mortgagee, XY as borrower, and the Trust and its trustees as guarantors and mortgagors. The Practitioner's retainer was a general retainer that required him to advise on all aspects of the transaction, including its risks and wisdom.
- 16 Recognising that a conflict of interest existed between S and the other parties to the transaction, the practitioner obtained a waiver of independent advice from S. However, S

expressed unease to the Practitioner about entering into the transaction, so the Practitioner engaged in negotiations with her, T and B to try to address her concerns. The Practitioner recognised that a conflict of interest existed between S and the other parties to the transaction and obtained a waiver of independent advice from her.

- 17 Rule 1.04 of the then applicable Rules of Professional Conduct stated that “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.” In order to obtain the prior informed consent of a client where rule 1.04 applies, a practitioner must:
- (a) Recognise the conflict or the possibility of one;
  - (b) Explain to the client what that conflict is;
  - (c) Explain to the client the ramifications of that conflict;
  - (d) Ensure that the client has a proper appreciation of the conflict and its implications; and
  - (e) Obtain the informed consent of the client to act for him or her.
- 18 Here, although the practitioner recognised that a conflict of interest existed between XY and S and obtained a waiver of independent legal advice from S, he failed to obtain S's prior informed consent before acting for all parties to the transaction. The Practitioner failed to provide S with timely and comprehensive advice on the nature of the conflict, the limitations it would place on his ability to advise her about the transaction and its risks, and the nature and risks of the transaction itself, and to ensure that she understood that advice. This was particularly important given that S had expressed concerns about entering into the transaction.

### Second charge

Misconduct in his professional capacity, pursuant to section 112(1)(a) of the Act;

Or, in the alternative:

Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise as a barrister or solicitor or as to bring the profession into disrepute , pursuant to s112(1)(c) of the Act;

Or, in the alternative:

Conduct unbecoming a barrister or a solicitor, pursuant to s112(1)(b) of the Act.

The particulars of the charge are as follows:

- 7 Following concerns that S had raised about the nature of the transactions she had entered into, the practitioner facilitated an agreement between S and XY by August 2007 whereby S would receive 10% of XY's profits as consideration for the security she was providing for the loans that XY had taken out. The practitioner recorded the nature of this agreement in a letter he wrote to United Finance on 20 August 2007.

~~78~~ On 21 December 2007, AB entered into a further loan agreement with XY, this time lending it \$562,809.68. S, T and the practitioner provided guarantees in their capacity as trustees of the Trust. The Trust provided by way of security second mortgages in favour of AB over its Z and Y properties. The Practitioner's liability as a trustee was limited to these Trust assets, but S and T's liability as trustees was not limited in that way. S and T also provided personal guarantees.

~~89~~ Again the practitioner acted for all parties to the transaction, at least initially. He acted for AB as lender and mortgagee, XY as borrower, the Trust and its trustees as guarantors and mortgagors, and S and T personally. The Practitioner's retainer was a general retainer that required him to advise on all aspects of the transaction, including its risks and wisdom.

~~910~~ On this occasion ~~the Practitioner did not obtain a waiver of independent legal advice from S the Practitioner and~~ only partially attended to ~~the~~ execution of the documents relating to the transaction. ~~The Practitioner did not obtain a waiver of independent legal advice from S before acting for her. S expressed unease to the Practitioner about entering into the transaction and the Practitioner engaged in negotiations with S, T and B to try to address S's concerns.~~

~~1011~~ Rule 1.04 of the then applicable Rules of Professional Conduct stated that "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." The requirements for prior informed consent are outlined in paragraph 8(a)-(e) of charge one, and are relied on in this charge.

~~1112~~ Here the practitioner again failed to obtain S's prior informed consent before acting for all the parties to the transaction. In addition to the failures identified in paragraph 9 of charge one (which are also relied on in this charge), the Practitioner also failed to:

~~(a)~~ Advise S to seek independent legal advice, ~~knowing that she had previously expressed concern about such transactions and that he had assisted the parties involved to address those concerns; and~~

~~(a)(b)~~ ~~to~~ obtain a waiver of ~~such independent legal~~ advice from ~~her~~ S prior to acting for her; ~~and~~

~~(b)(c)~~ Explain to S the significance of, and risks involved in, providing a personal guarantee; ~~and.~~

~~12~~ ~~Advise S to seek independent legal advice after she expressed unease about entering into the transaction. To the contrary, the Practitioner continued to act for S and engaged in negotiations with S, T and B to try to address S's concerns.~~

13 XY failed and in October 2008 AB issued S, T and B a notice under the Property Law Act on S, T and B informing them that they had defaulted on their repayment obligations and requiring them to repay \$594,434.38. In 2008 T moved to [overseas] and in 2011 he was declared bankrupt. That same year B was imprisoned for various fraud and dishonesty offences unrelated to XY's ventures. S was eventually forced to sell the Z property and to refinance the Y property to discharge the debts.