NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 8
LCDT 005/15

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY WESTLAND STANDARDS COMMITTEE NO. 1** Applicant
AND	**KENNETH SELWYN GRAVE** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr M Gough
Mr A Lamont
Mr S Maling
Mr S Walker

HEARING at Timaru District Court

DATE OF HEARING 22 March 2016

DATE OF DECISION 12 April 2016

COUNSEL

Mr J Shaw for the Standards Committee
Mr G Gallaway and Ms S Lester for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL AS TO PENALTY AND NAME SUPPRESSION

Introduction

[1] Mr Grave faced one charge, pleaded with three alternative levels of conduct – misconduct, negligence and unsatisfactory conduct. After negotiations with the Standards Committee, Mr Grave agreed to admit the charge at the level of negligence and this, with an agreed set of facts was put to the Tribunal, along with suggested penalties.

[2] The Tribunal accepted the proposed amended particulars but reserved the right to determine for itself the level of culpability and penalty, after hearing the evidence and submissions.

[3] The other outstanding matter for the hearing was an application for final name suppression, which was opposed by the Standards Committee.

[4] Following the hearing, we indicated we were prepared to accept culpability at the "negligence" level. We also told Mr Grave we would not suspend him from practice. This decision addresses the remaining matters and provides our reasons for the two indications already given.

Background

[5] The charges and agreed particulars are attached as Appendix I to this decision.

[6] In summary, Mr Grave acted for Mr and Mrs P in the purchase of their home and the making of their wills. Mr and Mrs P paid for the home with a cheque drawn on their joint account, shortly before returning to the United Kingdom to settle their affairs before moving to New Zealand permanently. However, the agreement for sale and purchase was in Mr P's name as agent, and the transfer of the title to the property was ultimately registered in Mr P's sole name alone.

[7] Mrs P suffered from dementia and although they had a son living locally, he was busy with work and a young family, and Mr and Mrs P were frequently assisted in their day to day needs by a friend they had made on arrival in New Zealand, Ms X.

[8] In his 2008 will Mr P left certain legacies, including $50,000 to Ms X and the residue in the estate to his wife. In 2010 Mr P added to the legacy for Ms X a bequest of "my motor vehicle and the sum of $50,000 to my friend Ms X …". Mr P predeceased his wife in February 2011. Mr P's son PP was appointed executor of the estate and queried with Mr Grave the registration of the title in his father's sole name.

[9] After some consideration and after consultation with one of his senior partners, Mr Grave reached the view the registration of the title had been an error and he determined that he should regard the late Mr P as having held the title as trustee for both he and his wife. Mr Grave determined that he ought to correct the title but before this process was completed Mrs P also died.

[10] Again PP was executor of his late mother's will but also the sole residuary beneficiary.

[11] It is apparent that by this point there were a number of conflicts of interest. These are most clearly set out in the evidence of Mr Darlow, who provided expert evidence on behalf of the practitioner:

> "[5] In my view, Mr Grave should have realised, certainly by the time (Mrs P) had died, that there was likely to be a contest between (PP) on the one hand and (Mr P's) legatees on the other. This presented a conflict for Mr Grave. While it was arguable that the property was beneficially owned jointly by (Mr and Mrs P), this was not certain.
>
> [6] Mr Grave should have advised (PP) that he could not act for him as either executor of (Mr P's) estate and subsequently (Mrs P's) estate or beneficiary under either estate. In other words, at the point Mr Grave identified that the A Street property was registered in the sole name of (Mr P), Mr Grave should have stepped back to let matters take their course rather than arranging for the transfer of the property to (PP)."

[12] We also comment that Mr Grave ought to have advised PP that he himself had conflicts of interest between his role as beneficiary and executor.

[13] Notwithstanding the situation, Mr Grave proceeded to prepare the Deed of Correction referred to in the particulars attached.[1] Furthermore, Mr Grave did not advise Ms X that she was a legatee in Mr P's estate. Indeed, even when Ms X telephoned Mr Grave in response to a newspaper advertisement about the estate, he did not mention this fact to her. He said he had no instructions to do so.

[14] The transmission of the title into PPs name was registered in February 2013 and in April 2013 Mr Grave wrote to Ms X about the provisions made for her in Mr P's will and codicil. Ms X was advised that the bequest of the vehicle had failed because it passed to Mrs P by survivorship and that the $50,000 bequest had abated to $9,410.36 because the A Street property had passed by survivorship to Mrs P, and the remaining assets to the estate were insufficient to pay all of the legacies. The figure was later increased after Mr Grave was advised of a further asset of the estate, but was still substantially below the bequest in Mr P's will.

[15] Instead of recommending to Ms X that she obtain independent legal advice in relation to the matter, the letter simply requested her to sign a statement at the base of a copy letter, to be returned to Mr Grave, which acknowledged the payment received would be "in full satisfaction of any claim which I may or maynot have in the estate either now or at any time in the future".

[16] Ms X subsequently entered into a private settlement with the estate.

[17] In accepting the amended particulars of fact[2] Mr Grave accepted that he contravened the following Rules of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules"):

> Rule 11.1 By engaging in conduct that was likely to mislead beneficiary Ms X as to the potential value of the estate;
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> Rule 5.11 By acting for PP as executor of both estates where by reason of a claimed mistake as to title there was potential for a claim by either estate against Mr Grave;
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> Rule 6.1 By acting for PP in the administration of both estates where there was a conflict between PPs interests as executor and as beneficiary of

[1] See Appendix I.
[2] See page 13, Particulars para 22(a)-(d).

> Mrs P's estate such as to pose more than a negligible risk of Mr Grave being unable to discharge his obligations to PP.

Issues

[18] The issues for the Tribunal to determine, to assess whether culpability ought to be at the misconduct or negligence level, are as follows:

1. Was Mr Grave's breach of the Rules, as acknowledged, "wilful or reckless" such as to constitute misconduct?

2. If not, did his actions reflect negligence such as to bring the profession into disrepute?

3. Was a penalty of less than suspension sufficient to mark the seriousness of conduct at this level?

4. Should name suppression be granted on a final basis?

Issue 1 - Level of culpability

[19] This is a case with a somewhat complex background and where there was considerable exchange of information between counsel and constructive discussions between counsel in advance of the hearing. As a result of the information provided to the Standards Committee, both through the affidavits filed by Mr Grave and preliminary negotiations, Mr Shaw, for the Standards Committee, was able to clearly state to the Tribunal that there was no question of dishonest intent to be advanced. Mr Shaw did not dispute that, apart from these transactions, the practitioner was a reputable and competent lawyer who acted with integrity.

[20] However, Mr Shaw submitted that the extent of the error was not just a simple error of judgment. Rather, this was a series of errors which compounded the problem so that it was objectively negligent to such an extent as to bring the profession into disrepute pursuant to s 241(c). Mr Shaw's submission was that Mr Grave became fixated on the strict legal position in relation to the title and its transmission and thus did not stand back and assess the conflict difficulties.

[21] Mr Gallaway submitted on behalf of Mr Grave that it is correct that his client did not recognise a material risk of the conflict of interest and failed to identify the different levels of conflict and the significant number of conflicts which existed.

[22] Mr Gallaway referred to Mr Grave's reputation as "… an honest, well intentioned, careful and considered practitioner". This submission was supported by affidavits from practitioners and other professionals in his region, none of whose evidence was challenged by the Standards Committee.

[23] We also had the benefit of oral evidence from Mr Grave who was cross-examined by Mr Shaw and answered questions from the Tribunal. Mr Grave accepted "with the benefit of hindsight and expert advice and scrutiny" that he should have recognised the material risk of conflict and turned his mind to the possibility of his error in the original title registration.

[24] Unfortunately, instead of raising those issues with the senior partner to whom he went for advice he simply raised the issue of whether his late client could be said to have held the property on trust for he and his wife. Having gone down that path, and narrowed the thinking in regard to the consequences of that technical issue, there was not a broader consideration of the overall implications for him continuing to act for PP or indeed for PP's own conflicts of interest.

[25] Once the property was transferred into PPs name, Mr Grave considered he had remedied the problem and unfortunately the wider ramifications were not perceived. While this is a serious omission as are the breaches of each of the Rules set out above, we do not consider that Mr Grave's actions were either reckless or wilful such as to invoke the more serious finding of misconduct.

[26] We consider that the agreed position between counsel, namely "negligence or incompetence of such a degree as to bring the profession into disrepute" is the proper finding for the Tribunal to make. Thus the answer to Issue 1 is "No".

Issue 2 - Negligence

[27] The answer to this, as will be apparent from the previous paragraph, is "Yes".

Issue 3 – Suspension

[28] The Standards Committee did not seek suspension and instead sought a censure and fine of $5,000.

[29] This is the first disciplinary matter faced by Mr Grave in his 17 years of practice as a solicitor. The further matters accepted in mitigation by the Standards Committee are Mr Grave's acknowledgment of his failure, by admission to the charge of negligence and that the entire process has been for Mr Grave a salutary one. It is the submission of the Standards Committee that Mr Grave posed very low risk of future transgressions. We note from the references provided by Mr Grave, that he was held in high esteem by his colleagues, particularly as a practitioner of integrity.

[30] We were very troubled by the letter of April 2013 to Ms X. However we have reminded ourselves of the dicta in *Daniels,*[3] that we must impose the least restrictive outcome necessary to reflect the seriousness of the conduct.

[31] We also note that penalty must reflect the purposes of the Act, namely the protection of the public and of the reputation of the profession, so that it may continue to be trusted by the public.

[32] We do not consider Mr Grave to pose any risk to the public given that he is by all accounts a careful and diligent practitioner.

[33] We do not consider that a sentence of suspension is necessary to demonstrate to the public that this matter has been taken seriously by the legal profession and its disciplinary institutions. This has been a lengthy process, which has been experienced as extremely stressful by Mr Grave and he will be in no doubt of the need to be absolutely rigorous about conflicts of interest in the future.

[34] For these reasons we did not consider that a suspension was necessary in the case of this practitioner.

[35] We did not consider the fine proposed by the Standards Committee of $5,000 to be sufficiently high to recognise the seriousness of the repeated failure to recognise

[3] *Daniels v Complaints Committee 2 of the Wellington District Law* Society [2011] 3 NZLR 850 (HC).

conflicts of interest. Conflicts of interest are, for the profession, a very significant aspect of practice. In terms of the denunciation and deterrence principles of penalty we consider that a fine of $10,000 is more appropriate.

Issue 4 - Name Suppression

[36] The Tribunal granted interim name suppression for Mr Grave at the time when the two more serious levels were denied. That decision, dated 18 February 2016 made it plain that should the charges be established following the hearing, the situation would be entirely different.

[37] The general principles as to name suppression are correctly set out in the submissions of Mr Shaw. The discretion, which is a broad one, resides in s 240 of the Act. There is a starting point of openness, and thus a threshold for the practitioner to reach to displace such openness, by establishing that his interests in privacy outweigh the public interest in knowing, not only the details of the conduct but also the name of the practitioner against whom the finding has been made.

[38] On behalf of the practitioner, Mr Gallaway strongly advanced the notion that a practitioner in a smaller centre risks greater reputational damage, as does his firm, than a lawyer in a larger metropolitan area. We consider that argument somewhat analogous to that put forward by Mr Hart[4], who submitted that a practitioner with a higher public profile ought to be given a greater consideration when name suppression is considered. That notion was firmly rejected by the Supreme Court.

[39] We also consider that, in a smaller centre, other practitioners are potentially "under a shadow" should the practitioner who has been disciplined not be named.

[40] We have carefully considered the affidavits filed by other members of the firm, however we do not consider there is a serious risk of reputational damage to the firm, having regard to the contents of this decision which largely endorse Mr Grave's integrity and capability, other than in respect of these transactions.

[4] *Hart v Standards Committee No. 1 of the New Zealand Law Society* [2012] NZSC 4.

[41] A further matter advanced was in relation to a vulnerable family member. We have already commented on that factor in our decision of 18 February and do not propose to repeat those comments.

[42] Facing disciplinary charges is a stressful and embarrassing process for all practitioners. The publication of a practitioner's name is not intended to be punitive but the Tribunal is realistic in recognising that it has a salutary and at times punitive effect. However we cannot allow those personal considerations in this case to outweigh the public interest in an open process without strong reason. The brief medical evidence provided is not sufficiently strong enough to displace the onus and we must also have regard to our decisions in similar cases such as *Hart*[5] and *Eichelbaum*.[6]

[43] The application for permanent name suppression is declined however, as signalled to Mr Grave, the interim name suppression order will remain in place until the expiry of the appeal period in this matter.

Referral to Registrar General of Lands

[44] The Standards Committee has asked the Tribunal to make a comment as to whether this matter ought to be referred to the Registrar General, a matter which might impact on Mr Grave's Landonline registration capacity. We are not prepared to make any comment because the matter was not fully argued. The particulars concerning the Landonline alleged infringement were withdrawn as we understand it in the final iteration of the charges. But, having had the benefit of Mr Darlow's evidence, we consider the Standards Committee may well be assisted by a review of that evidence before making any decision to refer.

Orders

1. Censure

   The practitioner is censured pursuant to s 156(1)(b) and s 242 as follows:

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[5] See above n 4.
[6] *Mr A v Canterbury Westland Standards Committee No 2 of the New Zealand Law Society* [2015] NZHC 1896 and *Canterbury Westland Standards Committee No 2 of the New Zealand Law Society v John Revans Eichelbaum* [2014] NZLCDT 23.

Mr Grave, conflict of interest is a subject to which every legal practitioner must pay very close attention. Lawyers are often in a position of superior knowledge and information compared with the lay member of the public, or the client. It is also hard to assess influences on thinking and decision-making which can result from conflicts. That is why there are very strict rules around them. You fell far short of your obligations to recognise and promptly act when conflicts existed over a protracted period.

Further Mr Grave, (while conflicted) you sent an inappropriate letter to the beneficiary of an estate which, on the one hand contained selective omissions of facts that might have led the beneficiary to seek independent advice and/or make a claim against the estate, and on the other hand sought to gain an indemnity against any such claim by the beneficiary in exchange for acceptance of a reduced legacy in full and final satisfaction. You are censured accordingly.

2. There will be a fine awarded against the practitioner in the sum of $10,000 pursuant to s 242(1)(i).

3. We accept that the practitioner has been fully cooperative with the Standards Committee and that the agreed contribution to their costs of approximately 80% is appropriate. Therefore the practitioner will contribute the sum of $20,000 to the Standards Committee costs pursuant to s 249.

4. There will be s 257 costs awarded against the New Zealand Law Society in the sum of $8,690.

5. The practitioner will reimburse the New Zealand Law Society the full sum of the s 257 costs, pursuant to s 249.

DATED at AUCKLAND this 12th day of April 2016

Judge D F Clarkson
Chair

Appendix 1

CHARGE

The Canterbury Westland Standards Committee (No 1) charges Kenneth Selwyn Grave ("Mr Grave"), of Timaru, Lawyer, with:

> Negligence in his professional capacity, and that negligence has been of such a degree as to bring his profession into disrepute pursuant to s 241(c) of the Lawyers and Conveyancers Act 2006 ("the Act").

The particulars of the charge are that:

1. In November 2004 Mr P purchased a residential property at A Street, Timaru ("A Street"). The purchase of A Street was settled on 15 December 2004.

2. Title to A Street was registered in Mr P's sole name. Mr Grave acted as solicitor for Mr P in that purchase.

3. On 20 March 2008 Mr P executed a Will (the "Will") where he appointed his son PP to be his executor and trustee, left certain legacies to family members, $50,000.00 to Ms X, and the residue in his estate to his wife Mrs P.

4. In or about September 2009 Mr P became the registered owner of a Daihatsu motor vehicle.

5. By a Codicil dated 24 June 2010 Mr P revoked the provision in the Will providing for the earlier legacy of $50,000.00 to Ms X and substituted in its place a bequest of *"my motor vehicle and the sum of $50,000.00 to my friend Ms X."*

6. Mr P died at Timaru on 16 February 2011. Mr Grave acted in the administration of his estate. With Mr Grave's assistance PP obtained Probate of Mr P's Will and Codicil from the High Court at Timaru on 12 April 2011.

7. When probate was obtained A Street was registered in the name of Mr P (as it had been at the time of his death). Neither Mr Graves nor PP contacted Ms X to advise her of the bequests nor did they attempt to realise the bequests until April 2013.

8. Mr P was survived by his wife Mrs P. By Will dated 12 January 2004 PP was appointed executor of her estate (in place of Mr P) and the sole residuary beneficiary.

9. Mrs P died on 10 July 2012. Probate was obtained on 2 August 2012 by PP with Mr Grave's assistance.

10. With Mr P having predeceased her, PP was entitled to the whole of the residue of Mrs P's estate after certain legacies. Mr Grave acted as solicitor in the administration of Mrs P's estate.

11. In or around August 2012 Mr Grave prepared a "Deed of Correction" which:

a. Noted an alleged error in the registering of the title of A Street to Mr P alone.

b. Asserted that the intention had been for Mr and Mrs P to jointly hold title in A Street.

c. Asserted that Mr P had thus been holding the title for A Street as trustee for he and Mrs P jointly, and therefore that title to A Street passed to Mrs P by survivorship at the time of Mr P's death.

d. Noted that the executors of both estates (PP in each instance) agreed to correct matters by transferring title to A Street to PP as executor of Mrs P's estate.

12. The "Deed of Correction" was executed by PP in his capacity as executor of each estate on 13 August 2012.

13. Ms X was an affected party given the legacy to her in Mr P's Will and Codicil. Ms X was not a signatory to the "Deed of Correction" and had no knowledge of it.

14. Mr Grave did not give adequate consideration to the possibility of seeking an order under the Trustee Act 1956.

15. The title to A Street records that a transmission of title from Mr P to PP as executor was registered on 21 February 2013 at 9:10am. A further transmission to PP as executor was registered on 21 February 2013 also at 9:10 am. At 5:28 pm on 21 February 2013 a transfer was registered to PP in his personal capacity.

16. Neither PP nor Mr Grave notified Ms X of the provision Mr P had made for her in his Will and Codicil until in a letter of 11 April 2013, after the transmissions and transfer had occurred.

17. In that letter Mr Grave advised Ms X of the bequest to her of $50,000.00 and the motor vehicle. In respect of the motor vehicle Mr Grave advised Ms X that the vehicle had been owned jointly by Mr P with his wife Mrs P, that it had therefore passed to Mrs P by survivorship and that the gift fails.

18. There was no mention in that letter of the vehicle being registered in the sole name of Mr P at the time of his death.

19. The letter of 11 April 2013 advised Ms X of other legacies provided for in the Will, provided a statement of the assets in the estate for a total value of $25,245.09, referred to liabilities in the estate of $15,834.73 and stated the value of the estate was such that Ms X's entitlement in respect of her legacy was thus estimated to be approximately 35.71% of the remaining $9,410.36.

20. The letter of 11 April 2013 did not refer specifically to A Street or the fact that Mr P had held title to that property in his sole name when he died. The letter did not refer to the transmissions and transfer of title that had occurred prior to her being contacted in that letter.

21. The letter of 11 April 2013 did not suggest to Ms X that she obtain independent legal advice. The letter requested that Ms X sign a copy of the Statement of Administration relating to the estate "in full satisfaction of any claim which I may have in the Estate either now or at any time in the future".

22. In these circumstances Mr Grave acted:

    a. Contrary to rule 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 by engaging in conduct that was likely to mislead beneficiary Ms X as to the potential value of Mr P's estate.

    b. Contrary to rule 5.11 by acting for PP as executor of both estates in circumstances where by reason of a claimed mistake that had been made in the way Mr P obtained title on A Street there was the potential for either Mr P or Mrs P or their estates or executor to have a claim against Mr Grave.

    c. Contrary to rule 6.1 by acting for PP as executor in the administration of both estates where there was more than a negligible risk that the interests of the executor in each estate were in conflict to such an extent that Mr Grave might have been unable to discharge the obligations owed to PP as executor in each estate.

    d. Contrary to rule 6.1 by acting for PP in the administration of both estates where there was such a conflict between PP's interests as executor of each estate and his interest as the sole beneficiary of the estate of Mrs P that there was more than a negligible risk that Mr Grave would be unable to discharge the obligations he owed to PP as executor of both estates.

    e. Without due consideration of the possibility of an application to the High Court under the Trustee Act to determine who title to the A Street property should be conferred upon, registering the transmissions of title to A Street to PP as executor firstly of Mr P's estate and then as executor of Mrs P’s estate and transfer to PP in his personal capacity.