NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 37

LCDT 021/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY-WESTLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**ANTHONY GEORGE WHITCOMBE** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr G McKenzie

Mr S Morris

Mr K Raureti

DATE OF HEARING 16 October 2019

HELD AT Maori Land Court, Christchurch

DATE OF DECISION 4 December 2019

COUNSEL

Mr H van Schreven for the Standards Committee

Ms J Forrest, Ms Z Caughey for the Practitioner

RESERVED DECISION OF THE TRIBUNAL

Introduction

[1] Mr Whitcombe faced two charges, each pleaded with the three alternative levels of culpability. He initially admitted the charges, at the lowest level of culpability, namely unsatisfactory conduct.

[2] At the hearing Mr Whitcombe's counsel acknowledged that the conduct in relation to the first charge could properly be recognised at the level of negligence.

[3] The Tribunal's task was then to determine whether the conduct in Charge 1, which involved a serious conflict of duties on the practitioner's part, reached the level of misconduct, or was more properly regarded as negligence, as admitted.

[4] The Standards Committee did not strongly advance the case that Charge 2 was more serious than unsatisfactory conduct.

[5] The Tribunal was invited to consider penalty at the same time.

Issues

[6] The issues to be determined were:

Charge 1

1. Were the practitioner's breaches of r 3, 3.2, 5.1, 6 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules), wilful or reckless such as to constitute misconduct?

2. If not, was Mr Whitcombe's negligence or incompetence to such a degree as to bring the profession into disrepute?[1]

[1] Section 241(c) Lawyers and Conveyancers Act 2006 (LCA).

Charge 2

3. Following Mrs L C's death, did Mr Whitcombe breach the Rules pleaded, in a manner that was wilful or reckless?

4. Were the practitioner's defaults at such a level as to constitute negligence, such as to bring the profession into disrepute?

Penalty

5. What represented a proportionate response to the above findings?

Background

[7] Mrs L C and the practitioner had met in the early 2000s through a professional connection and the practitioner described their relationship as "more personal than professional". He indicated that the work carried out for her was normally "a personal favour".

[8] Mr Whitcombe was aware that Mrs L C had attempted previously to sell a property owned by her and then was approached by her to act on its sale, which had been agreed between her and a close family friend of hers, Mr R S, the purchaser.

[9] The practitioner had previously acted for Mr R S in unrelated matters and knew of the close nature of the relationship between him and Mrs L C. The agreement that the parties had reached was for the sale at a total value of $225,000. $150,000 of that was to be paid in cash at the time of the transfer and the $75,000 balance was to be provided as the value attributed by the parties to a section which was to be transferred back to Mrs L C, following a subdivision of the property by Mr R S.

[10] An agreement was prepared by the practitioner and signed by the parties in August 2010 on the basis that he was acting for both vendor and purchaser. There was nothing written on the file that recorded terms of engagement or a client care commitment to either. Mr Whitcombe accepted:[2]

> "(a) That he did not either obtain the informed consent or any waiver from either client to act in respect to the transaction;

[2] As set out in submissions for the Standards Committee.

(b) There was no advice given to either client of the need or desirability of their taking independent legal advice;

(c) No independent valuation of the Property (either in its original or proposed subdivided form) was obtained or sought."

[11] Counsel for the Standards Committee set out a number of shortcomings in the agreement itself, in addition to the clear conflict of interest between clients, and therefore conflict of duties arising on the part of the practitioner. The deficits in the agreement were numerous and serious and both the practitioner and the Tribunal accepted the evidence that he was "hopelessly conflicted" and that the agreement was inadequate. The practitioner could not explain why he had not simply used the standard agreement for sale and purchase form.

[12] Of serious concern was there were no default provisions in the agreement should the subdivision not proceed, nor did it provide any form of security for the vendor, in the event of the failure to subdivide, for the balance of the purchase price.

[13] In fact, the subdivision did not proceed, and the property was sold by way of mortgagee sale in August 2012.

[14] The practitioner was adamant he did not have a retainer to continue to act for Mrs L C following the initial sale of the property. His evidence was that Mrs L C moved to Christchurch in about November 2013 and they remained in touch although not as frequently after her move. They would often meet, together with Mrs L C's daughter, Ms C C, who gave evidence in support of the practitioner, at a café or at his office. The practitioner accepts that during those meetings Mrs L C would "discuss her frustrations about the monies owed to her, mainly from her son but also from (R S)".

[15] Charge 2 arises out of further instructions given by Mrs L C to recover the loans made to her son and daughter-in-law and also to follow up the payment from Mr R S.

[16] Mr Whitcombe states that in one of the earlier meetings he did advise Mrs L C about her options to recover the money (both from her son and from R S) but she was reluctant to take those formal steps through the Court or Disputes Tribunal because she wished to preserve the personal relationship with both her son and with Mr R S, to whose family she remained close. Mr Whitcombe confirmed he had never received

formal instructions to act against R S and accepts he could not have done so because of the conflict which would have arisen in any event.

[17] The practitioner's evidence is confirmed by Ms C C. Ms C C was often present at the meetings between her mother and the practitioner and on occasion these occurred in her house. She stated:

> "Anthony had told her that she had options to get the money back (like going to court) but Mum was so emotionally drained by B and R's actions that she couldn't bring herself to push Anthony to do anything about it. And she didn't have the money to pay legal fees, and she couldn't expect Anthony to do it as a favour.
>
> To the best of my knowledge, as an attendee of most of the meetings between Mum and Anthony, Mum never instructed Anthony to go after B and R to recover her money."

[18] Mrs L C did instruct the practitioner to attempt to recover funds from her son, however after a letter (in which the practitioner named the wrong sum owing, which caused some negative repercussions) the matter was taken no further.

[19] Later, Mrs L C instructed Mr Whitcombe in the preparation of a will, however this was not executed before she died.

[20] A request to uplift her file was not pursued by Mrs L C.

[21] There was a further set of circumstances which formed part of the complaint of Charge 2 relating to a situation following Mrs L C's death. Mr Whitcombe was asked whether there was a will which indicated how the deceased had wished her remains to be treated. He advised that it had been her wish to be buried, but then later discovered that he did not have an executed will. The practitioner had opened an Estate file following Mrs L C's death without instructions. Subsequently letters of administration were sought by the complainant's father using another lawyer.

Issue 1

[22] Having carefully considered this matter, and in particular the evidence of the practitioner and his supporting witness, the Tribunal did not consider that Mr Whitcombe's actions represented either a wilful or reckless disregard of the Rules.

[23] Rather, we saw him as having somewhat blurred the boundaries between the personal and professional relationship he had with Mrs L C and had been too willing to simply assist with the implementation of an informal agreement between Mrs L C and another of his clients without considering the implications of the conflict that that provided.

[24] We were of the view that this led the practitioner into what seems to have been a hasty preparation of a grossly inadequate form of contract between the parties, which he himself accepted was negligent to such an extent as to bring the profession into disrepute.

[25] We considered that this particular conduct, occurring as it did in a small town with few legal representatives available to the parties, was a one-off for this practitioner and not an example of his usual practice, rather than a wilful or reckless ignoring of his obligations.

[26] For those reasons the answer to the question posed in Issue 1 is "No". Although acting in a situation where a conflict of duties arose is a very serious matter, we did not consider this reached the standard of misconduct in this particular instance.

Issue 2

[27] As admitted, this is certainly a case of clear negligence on the part of the practitioner in failing to properly protect the vendor, firstly from the risks posed by a conflict of interest, and secondly, from the risks proposed by a subdivision which was required to ensure that she received full payment, in circumstances where no default or penalty provisions were in place in the agreement drafted by the practitioner.

[28] The answer to the question posed by Issue 2 is therefore "Yes".

Issues 3 and 4

[29] Given the fluctuating wishes of Mrs L C as to enforcement of both the loans to her son and the sale agreement, her lack of resources to pursue the matter and thus the lack of clear instructions to the practitioner, we do not consider that his defaults in

respect of the cumulative matters pleaded under this charge reach the standard of either misconduct or negligence.

[30] We consider that this is more properly viewed, at the level which has been admitted by the practitioner, namely unsatisfactory conduct. It was conduct which fell "*short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".*[3]

Penalty – Issue 5

Seriousness of Conduct

[31] We consider the level of negligence in respect of the sale transaction including the conflict of duties to be at a high level. Thus, the conduct must be considered as relatively serious.

[32] As to aggravating features, the fact that the finding of unsatisfactory conduct in relation to subsequent dealings has also been made, as an aggravating feature.

Mitigating Features

[33] We consider the practitioner is entitled to considerable credit for a lengthy career (some 30 years without any previous disciplinary findings against him).

[34] We also note that the practitioner is practising in an area of the country which is very under-resourced in respect of legal practitioners and that he fulfils a role as a diligent practitioner for the community, particularly practising in branches of law which many practitioners avoid.

[35] We note that there was no dishonesty involved nor personal gain. The practitioner charged Mrs L C the sum of $23 in fees in respect of the sale.

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[3] Section 12 LCA.

[36] Mr Whitcombe also receives credit for the fact that he took responsibility at an early date, instructed counsel, and engaged in a cooperative approach to the disciplinary process.

[37] As pointed out by counsel for Mr Whitcombe, the practitioner continued to have a good relationship with Mrs L C until her death.

Other Decisions

[38] Counsel for Mr Whitcombe put to the Tribunal a number of decisions of the Lawyers Standards Committees in various parts of the country where quite serious conflicts of interest/duties have been treated on a very lenient basis, with findings of unsatisfactory conduct and fines. With the greatest of respect to the decision makers in those matters, the Tribunal was somewhat concerned at such serious matters having been regarded as only being at the level of unsatisfactory conduct. We therefore did not find them particularly persuasive. Having said that, there is a clear need for consistency in order for practitioners to properly appreciate the seriousness of acting in situations where a conflict of duties arises.

[39] It may be that this is an area where the New Zealand Law Society may consider that further education may be usefully provided to practitioners.

[40] In terms of similar decisions of the Tribunal, we found that this matter was most closely analogous to the situation in the decisions of *Grave*[4] and *Horsley*[5] or *Monckton.*[6] In those cases the practitioners had solid professional careers to fall back on and only in the *Monckton* matter was the practitioner suspended for a very brief period.

Other Factors

[41] Further factors which we take account of in the penalty decision are of course the broader principles of penalty, which reflect on the need for protection of the public.

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[4] *Canterbury Westland Standards Committee v Grave* [2016] NZLCDT 8.
[5] *Auckland Standards Committee 2 v Horsley* [2018] NZLCDT 29.
[6] *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.

We did not see this to be a factor to be strongly weighted in this case because of the practitioner's otherwise good record.

[42] We also took account of the principle of the least restrictive intervention set out in *Daniels.*[7]

[43] The need for deterrence, which we consider in this case is only of a general and not specific nature, is also taken account of.

[44] Further, there are some personal factors of the practitioner's situation (which the Tribunal accepts, are given a lesser weight in disciplinary proceedings than in other proceedings) but are nonetheless relevant. These include the fact that he is in a geographically under resourced area (in terms of availability of lawyers) so that his suspension would have an adverse effect on his clients and on the public generally. The practitioner is also registered as a lawyer prepared to undertake instructions on legal aid.

[45] We note that the practitioner acts as a District Inspector for Mental Health on the West Coast and also as a senior Lawyer for Child. Both of these roles are important and ought not to be disrupted unless necessary.

[46] In addition to that, the practitioner is a sole practitioner who employs three other persons.

[47] Finally, we note that the complaint was not made by the client herself, and that it was made some eight-and-a-half-years after the sale transaction with which the conduct was largely concerned.

Decision

[48] For all of the above reasons, but in particular because we do not consider the practitioner to be a risk to the public, and we consider that his considerable failures in this transaction were isolated, we consider that it is not necessary to suspend Mr Whitcombe to reflect a proportionate response to this serious offending.

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[7] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850.

Instead we imposed a significant fine of $10,000 at the time of making our orders on 16 October 2019. This is apportioned as to $8,000 to reflect the seriousness of Charge 1, and $2,000 in respect of Charge 2. The orders include a Censure, which is attached.[8]

Costs

[49] We have considered further submissions relating to costs. The decision in *Lagolago*[9] emphasised the broad discretion of the Tribunal as to costs, reflecting as that does the special role of disciplinary proceedings, which are otherwise funded by the profession and are brought in the public interest. The Court of Appeal subsequently upheld a refusal of costs on an otherwise "successful" appeal.[10]

[50] We accept the Standards Committee submission that "misconduct" was certainly arguable on the facts of this case, in respect of Charge 1. It was properly brought as a charge and the fact that we have ultimately found serious negligence instead ought not to result in the profession bearing any of the costs of the prosecution.

[51] The amount of the Standards Committee costs to be paid by the practitioner are confirmed as $10,350.

[52] The Tribunal s 257 costs to be paid by the Law Society and reimbursed to the Law Society by the practitioner, are certified in the sum of $7,201.

DATED at AUCKLAND this 4th day of December 2019

Judge D F Clarkson
Chair

[8] The orders are referred to in the Schedule attached to this decision.
[9] *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038.
[10] *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406.

Schedule

Orders

[1] We have reached a view as to penalty and can announce that now but of course along with our reasons for our finding of culpability we'll deliver our written reasons for the orders that are about to be made in writing.

[2] We have determined that we ought not to suspend you at this point, for reasons which will be set out in our decision. Instead, we make the following orders:

1. There will be a censure which will be delivered to you in writing, as part of the decision.

2. In the absence of suspension, the fine clearly has to be a significant one and we have determined that that ought to be treated globally across the two charges and the fine will be a total of $10,000.

3. You are ordered to pay the full costs of the Standards Committee. The amount is to be approved by the Chair on production of invoices from the Standards Committee counsel.

4. The s 257 Tribunal costs are to be certified in due course and will be awarded against the New Zealand Law Society as is mandatory.

5. Mr Whitcombe you are to reimburse the full s 257 costs to the New Zealand Law Society.

Censure

Mr Whitcombe, this Tribunal has found you guilty of Negligence in respect of Charge 1 and has accepted your admission of Unsatisfactory Conduct in respect of Charge 2.

You are censured in respect of Charge 2 because essentially you failed to provide documents and files to L C's family following her death within a reasonable time of a reasonable request having been made. That lack of timely response is behaviour that is not tolerated in members of the profession, either by this Tribunal or other disciplinary organs of the profession. Such behaviour calls, at the very least, for a censure.

In respect of the first Charge you failed to recognise an obvious conflict and to deal with that conflict appropriately. The "Deed of Agreement" you prepared was woefully inadequate and could never properly protect either L C's interests or the interests of the other party. Your failure to follow up the performance of the contract until it was too late and the property had been sold by the mortgagee was a blatant failure on your part to protect the interests of L C to whom you owed a clear duty. For those failures, Mr Whitcombe, you are censured.

A censure is more than mere words. It is a mark of the disapproval of your profession, expressed through this Tribunal. It is a mark that will remain always on you record as a reminder to you and others that such behaviour is totally unacceptable for a member of the legal profession.