NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 29

LCDT 032/17

UNDER	The Lawyers and Conveyancers Act 2006
IN THE MATTER OF	Disciplinary Proceedings Under Part 7 of the Act
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**RICO SCOTT HORSLEY** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Mr W Chapman

Ms S Hughes QC

Mr P Shaw

Mr W Smith

ON THE PAPERS

DATE OF DECISION 22 August 2018

COUNSEL

Mr S Waalkens and Ms E Mok for the Standards Committee

Mr P Napier for the Practitioner

DECISION OF THE TRIBUNAL AS TO PENALTY

Introduction

[1] In its reserved decision of 26 June 2018, the Tribunal found the practitioner guilty of negligence in his professional capacity as defined by s 241(c) of the Lawyers and Conveyancers Act 2006 ("the Act"). The Tribunal found the practitioner's actions were at the lower end of the scale of negligence and indicated that, in the circumstances of this particular case, it was prepared to consider penalty on the papers without a need for a further hearing, provided that the parties consented to that course. They did so and the Tribunal has now received submissions on penalty from counsel for the Standards Committee and counsel for the practitioner.

Background

[2] The background and factual findings are contained in our decision of 26 June and we do not propose to repeat them, other than to summarise that the case involved a conflict on the practitioner's part in acting for two clients in a transaction where there was a more than negligible risk that the practitioner might be unable to discharge the obligations owed to them both.

[3] We do not propose to repeat the specific failings which we found in the practitioner but we do record by way of guidance for other lawyers, that where a client is elderly, good practice demands independent verification of capacity and the taking of particular care in ascertaining complete understanding and consent to a transaction being undertaken on that person's behalf.

[4] Counsel are agreed as to the principles underlying the Tribunal's role in imposing penalty. It is not a punitive role but rather a role which recognises the need to protect the public and uphold the reputation of the profession and in some cases, provide general and specific deterrence. The principle of the least restrictive intervention enunciated in *Daniels*[1] is borne in mind.

---

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

[5] The starting point is the seriousness of the offending and we have indicated that we consider that, while acting in a conflict situation is always a serious matter, there were a number of contextual matters which mitigate the seriousness of the offending.

[6] In particular, the omissions in provision of information to Mr Horsley by the younger of his two clients are, in our view significant. These are set out by his counsel in the penalty submissions as follows:

> "(i) She did not tell Mr Horsley about the EPA held in relation to VG's property.
>
> (ii) She did not tell Mr Horsley that a previous lawyer had refused to act on the transaction because of a family dispute.
>
> (iii) She did not tell Mr Horsley that VG's age was advanced.
>
> (iv) She did not tell Mr Horsley about the family dispute in play (which might have explained the seeming urgency to carry out the work)."

[7] Having regard to the withholding of this information, the practitioner did not have the opportunity of considering, for example, whether he should forward the document in advance. In this way his older client would have had sufficient time to consider it. This would have been preferable to arriving with the document to be signed immediately, and in the presence of the other party.

Mitigating Features

[8] This is the practitioner's first disciplinary finding in 14 years of practice.

[9] Secondly, Mr Horsley was able to recognise that, with hindsight, he would handle the situation differently by recognising the conflict, sending one client for independent advice and seeking more information about the family circumstances. He also accepted that he ought to have notified the holder of the EPA once he was aware of his status, before sending a letter of engagement, particularly after the complaint had been lodged and finally, that he should have specifically outlined the risks to both clients which might have arisen for them in this transaction.

[10] We accept that this was a normally careful practitioner who simply failed to recognise what he was dealing with in this case.

Aggravating Features

[11] We do not consider there are any aggravating features.

Relevant Case Law

[12] Both counsel addressed us on a number of the Tribunal's previous decisions. These do not need to be specifically referred to, however we accept counsel's submission that this matter is most closely analogous to the *Grave*[2] decision, albeit at a slightly less serious level.

[13] It was common ground that this matter could properly be dealt with by a fine, censure and an award of costs. This is certainly not a situation where the protection of the public requires a more serious intervention such as suspension.

Decision and Orders

[14] We accept the submission of counsel that the recommended penalties are proper in this matter, to reflect the seriousness but to take account of the mitigating features to which we have referred.

Orders

1. A censure as follows below.

2. The practitioner is fined the sum of $4,000.00.

3. The practitioner is to pay the Standards Committee costs in the sum of $35,000.00.

4. The s 257 Tribunal costs are certified at $8,035.00 and are awarded against the New Zealand Law Society.

5. The practitioner is to reimburse the New Zealand Law Society for the s 257 costs in full.

---

[2] *Canterbury Westland Standards Committee No. 1 v Grave* [2016] NZLCDT 8.

CENSURE

Mr Horsley, you have been found guilty by this Tribunal of negligence in your professional capacity of such a degree as to bring your profession into disrepute pursuant to s 241(1)(c) of the Lawyers and Conveyancers Act 2006. The Tribunal has found that you negligently misinterpreted Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 in concluding that there was not a more than negligible risk of conflict in the circumstances of this case, or alternatively you negligently ignored Rule 6.1 altogether. You then may have addressed the question of informed consent referred to in Rule 6.1.1 even though informed consent under Rule 6.1.1 cannot and does not override the basic premise of Rule 6.1.

The circumstances in which you received instructions from a younger family member, purportedly on behalf of herself and a much older family member, to carry out a conveyancing transaction that shifted a substantial value from the older lady to the younger one ought to have rung warning bells that you did not recognise.

The younger lady was a new client whom you had never met before. The instructions were delivered, according to her evidence, by telephone rather than at a face to face meeting. She drew your attention to a written agreement between her and the older lady that she either read out to you on the phone or delivered to you in some way. You prepared various documents on the basis of that agreement to give effect to the apparent agreement between the two family members.

You then visited them both at the residence of the older lady which was probably the first time you had personally met either of them. You carefully explained the content and effect of the documentation you had prepared, you say particularly to the older lady, who was surrendering a substantial value in her home to the younger lady. This explanation and advice was given while both ladies were present and not to each of them in the absence of the other.

Such circumstances have just about all the elements of irreconcilable conflict that should have been obvious to you as an experienced conveyancing lawyer. They are the sort of elements that point to the existence of a "high risk" transaction in terms of the E-dealing Practice Guidelines with which you ought to have been familiar. You failed to take any appropriate or proper steps to deal with a high-risk transaction or to ensure that both clients had proper independent advice and maybe allow you to continue to act for one of them (but never both) in accordance with Rule 6.1.3.

To add to your negligent handling of this case you failed to provide any information pursuant to Rule 3.4 and 3.5 until some weeks after the transaction had been completed and the title to the property had been changed to the detriment of the older lady and the benefit of the younger one.

Mr Horsley, you are censured by this Tribunal for your behaviour. Such a censure will remain always on your file and will demonstrate to the public that such behaviour will not go unmarked by the disciplinary process which has, in part, a consumer protection role. It will remind other members of the profession that the behaviour you exhibited will not be tolerated.

DATED at AUCKLAND this 22nd day of August 2018

Judge D F Clarkson
Chair