NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 22
LCDT 007/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2** Applicant
AND	**LLOYD COLLINS** Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Ms J Gray
Mr F Pereira MNZM
Ms S Sage
Prof D Scott

HEARING 13 July 2021

RESUMED HEARING 10 June 2022

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 30 June 2022

COUNSEL
Ms N Pender for the Standards Committee
Mr R Fowler QC for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] This decision considers whether the lawyer charged, Mr Collins, fulfilled his obligations to a vulnerable client who was suffering from early onset Alzheimer's dementia.

[2] It assesses whether he acted where there was a conflict in his duties to different clients in conveyancing transactions.

[3] It also considers what steps a practitioner, who becomes aware of possible undue influence or a conflict of interest on the part of the attorney, ought to take.

Issues

[4] Although headed "Charges", the charging document sets out one charge of misconduct, with two lesser alternatives. Specifically, the 23 particulars pleaded allege that Mr Collins failed in his obligation to be free from "compromising influences or loyalties" or had conflicting duties.[1]

[5] To consider whether the stated Rules have been breached, and at what level of liability, the Tribunal must determine:

1. Who is, or are, the client or clients represented by Mr Collins?

2. If there was more than one client, do their interests diverge, or was there at least a "more than negligible risk" that Mr Collins might be unable to discharge his obligations to both? If we consider the latter occurred, at what stage did it occur?

[1] Rules 3, 5, 5.1, 5.2, 5.3, 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

3. If a conflict arose, as above, was it properly addressed by Mr Collins? If not, at what level of liability do we assess the breach of the Rules falls?

Background

[6] The primary client, and person for whom concerns have been expressed by the Standards Committee, was Mrs W. She had been married to her late husband for more than 22 years, and they each brought children from previous relationships to their marriage. Mr W had a son and daughter and Mrs W had one son, who were quite young at the stage when Mr and Mrs W met and were a significant part of their family life as they grew up.

[7] In August 2012, Mr and Mrs W had executed mirror wills which granted a life interest to the surviving spouse in the principal home at the date of death. The residue of the estate was granted to the other spouse or, in the event of predeceasing that spouse, to the three children in equal shares. In other words, the children and stepchildren were treated equally by the couple.

[8] At the same time, Mrs W created two Enduring Powers of Attorney (EPOA), one appointing her husband as a care and welfare guardian with her stepdaughter as an alternate and another. The other EPOA appointed her husband as attorney for property matters with her stepson and another as successor attorneys.

[9] Sadly, in around 2016, Mrs W was diagnosed with early onset Alzheimer's disease. It was not very long before she had to give up her employment and the couple moved to live with Mr W's daughter, L, who was residing in a property in Carterton owned by Mr and Mrs W. L had to that point been paying rent but, in exchange for her taking over the role as daytime caregiver for Mrs W, she and her young son lived in the property with Mr and Mrs W rent free.

[10] The couple owned another property at Woodville and Mr W initially worked in Palmerston North while preparing that second property for sale, living between the two houses it would seem. It is said that their intention had been to repay the mortgage on the Carterton property from the sale proceeds of the Woodville house and thereby put Mr W in a position to retire early to look after his wife. Sadly, his unexpected death of a heart attack put an end to these plans.

[11] When Mr Collins first met Mrs W on 28 June 2017, it was only 15 days after Mr W's unexpected death and she was still in a shocked and distraught state. She was brought to the meeting by her sister, Mrs M, and the sister's partner.

[12] Shortly after Mr W's death, Mrs W had gone to stay with one of her sisters to avoid the noise and large number of people at the Carterton house for the funeral, which was apparently a stressful situation for Mrs W.

[13] There is a dispute in the evidence about whether Mrs W wished to return to be cared for by L at the Carterton property and if her sisters, Mrs M and Ms X, prevented that from happening.

[14] Certainly, there is uncontested evidence from K, the stepson who, as executor of his father's will, attempted on a number of occasions to contact Mrs W but was prevented from doing so by her sisters. All the available evidence tends to suggest that Mrs W was well cared for by her stepdaughter in the time leading up to her husband's death and that Mrs W had described L to her doctor as a supportive person.

[15] At the first consultation, Mr Collins did not see Mrs W by herself. Her sister, Mrs M, and the sister's partner remained in the meeting. Mr Collins made notes of the meeting and included in the information noted by him were concerns about the following matters:

- There was a property at Carterton where she had previously lived with her husband and stepdaughter and that her stepdaughter was now living there rent free. The property had a $170,000 first mortgage which she understood was in arrears and Mrs W was very stressed because she said she did not have the financial resources to maintain mortgage payments. (It later became apparent that there was a $200,000 life insurance policy owned by Mrs W on her husband's life which was immediately claimable, but Mr Collins was not informed about this at the first interview). Mrs W was said to be anxious that the property be sold immediately so that the mortgage could be repaid and understood that she was an executor of her husband's estate.

- Issues were raised about chattels and a motor vehicle at the property and the removal of private information from the property, allegedly by K. There was also a suggestion (which later appeared to be false) that Mrs W had been asked to sign documents by L and K at the funeral.

- It was noted that K held a power of attorney and although not recorded in his file note, Mr Collins says that he recalled a discussion at that time about removing K as Mrs W's attorney.

- Finally, and importantly, Mr Collins noted that Mrs W told him she wanted future instructions and communications to be conveyed through her sister, Mrs M.

[16] Given her diagnosis, Mr Collins quite properly referred Mrs W to Dr Matthews for an updated medical assessment. On 6 July, Dr Matthews reported that at 59, Mrs W had a diagnosis of Alzheimer's disease and had most recently been assessed on 10 February 2017. The Doctor carried out an Addenbrooke's Cognitive Examination which scored 52 out of 100. In the sphere of memory deficit, she scored particularly poorly, at 4/26, while her language capacity remained fairly high at 23/26. The doctor carefully assessed whether Mrs W still had decision-making ability around her personal care and welfare in order to understand the significance of a new EPOA being signed by her and found that she had such. Mrs W confirmed to the doctor that she was content living with her sisters who she found supportive.

[17] Having received this report on 7 July, Mr Collins emailed K as executor of Mr W's estate with a number of questions about probate and the administration of the estate. On the same day he received a response from Gawith Burridge, advising that they were acting in the administration of the estate, and alerting him to Mrs W's issues around capacity.

[18] On 11 July 2017, Mr Collins recommended to Mrs W, via Mrs M, that she instruct him to revoke both EPOAs. He followed this up with a letter to Gawith Burridge on 14 July, enclosing a notice of revocation in respect of both EPOAs.

[19] On 18 July, Mr Collins received an email from Mrs H, the mother of L and K, namely Mr W's former partner. She identified herself as a friend of Mrs W, and the fact

that she had once been a client of another partner in Mr Collins' firm. She described that Mrs W had been a loving stepmother to her own children for a quarter of a century and she believed they loved Mrs W as much as they loved her, their own mother. She described how, since Mrs W's Alzheimer's diagnosis, she had lived at the Carterton house and been cared for by her stepdaughter, L. She said this was because Mrs W had such severe short-term memory loss that she was unable to be safely left alone.

[20] Mrs H went on to describe how, since Mr W's death, Mrs W's sisters had denied access to her, K, L or the grandchildren. She said that on 22 June 2017, Mrs W had telephoned L asking her to pick her up and take her home but when L arrived, she was stopped by one of the sisters and told to stay away from their property. Mrs H described her concern that Mrs W was vulnerable and might be subjected to some indirect emotional abuse by her sisters and that their motive for isolating her from her stepchildren may relate to the potential for financial abuse.

[21] The only information that was provided to the Tribunal about Mr Collins' response to this email, was that approximately 50 minutes after receiving it, he forwarded it to Mrs M. There is no evidence, and he does not say, that he made any further enquiries to satisfy himself that the concerns or allegations were groundless.

[22] The new EPOA for property, which appointed Mrs M as attorney, was signed by Mrs W on 25 July 2017. At this point, Mr Collins saw Mrs W by herself, acted as an independent witness pursuant to s 94A(4) of the PPPR Act[2] and asked Mrs M to take the document away to be signed in front of someone else.

[23] Section 97 of the PPPR Act[3] allows for the donor of an EPOA to authorise the attorney to exercise powers under the document immediately, while the donor is mentally capable, or alternatively to have effect once the donor becomes mentally incapable. The EPOA initially executed by Mrs W was of the latter variety.

[24] However, it is acknowledged that both Mrs M and Mr Collins operated under the misapprehension that, although medical evidence had been obtained from Dr Matthews that Mrs W retained decisional capacity, the EPOA was effective

[2] Protection of Personal and Property Rights Act 1988.
[3] Ibid.

immediately and acted accordingly, with Mrs M signing documents and generally taking the lead in organising Mrs W's affairs.

[25] Mr Collins says that he was able to take instructions via Mrs M and to have dealings with her on behalf of Mrs W without any concern anyway, because that was the instruction that had been given to him by Mrs W at the first meeting. However, we note that was the meeting where Mrs W was accompanied by Mrs M and her partner and did not give that instruction to Mr Collins in their absence at that stage.

[26] Mr Collins was clear in his evidence however, that when explaining the EPOA (on two occasions as will soon be seen), he did see Mrs W on her own and her position remained the same in that she wished her sister to handle her affairs.

[27] In terms of the instructions he had received, Mr Collins proceeded to firmly urge upon the estate's solicitors prompt disposal of the house in Carterton (the other house in Woodville had, because of its joint ownership, automatically vested in Mrs W).

[28] There was resistance on the part of the estate solicitors, in that their advice from real estate agents was that performing some work to bring the property up to a better standard for sale was likely to yield a better return for the estate, and so they ensured that this happened. Those solicitors also requested a contribution from Mrs W towards those repairs, and rates and insurance, since she was bound to pay those under the terms of her life interest.

[29] Mr Collins firmly resisted any attempts for payments by Mrs W on the basis that she had no funds. It would seem that the collection of the insurance policy proceeds of $200,000 was attended to by Mrs M rather than by Mr Collins' firm, so he may not have been fully aware of her financial circumstances because he wrote to the estate's solicitors on 2 October 2017, suggesting that their request was "devoid of reality", and threatening legal action to replace the trustees if the property was not marketed within seven days.

[30] It would seem that Mrs M provided Mr Collins (and presumably Mrs W) with misinformation about L continuing to reside in the Carterton property rent free. In fact, she had vacated the property only a few weeks after her father's death. That

misinformation did not appear to put Mr Collins on alert about the reliability of Mrs M's statements.

[31] The property was listed for sale in early December 2017 and was sold at auction on 18 January 2018. It was sold at the reserve price of $380,000. The evidence indicates that Mr Collins and Mrs M received copies of sales updates, feedback reports and the recommended reserve price. The property initially failed to meet the reserve, however after brief family discussions it was purchased at a bid which equated with the reserve price, by Mrs M, her partner and her brother, as trustees of their respective family trusts.

[32] At that point, Mrs M was recorded as co-vendor, as an authorised person for Mrs W and also signed the memorandum of contract as purchaser. Mr Collins was nominated as lawyer for the purchasers and also for Mrs W (although the estate solicitors acted on the sale). The purchasers were represented by Ms Seddon, a solicitor in Mr Collins' firm and under his supervision. Her primary contact person for all aspects of the sale was Mrs M. Mr Collins, notwithstanding his lack of direct involvement, accepts that he must take responsibility for actions of his staff member as if they were his own.

[33] Mr Collins lodged a notice of claim against the Carterton property, on behalf of Mrs W. At settlement time, Mr Collins was refusing to discharge the Notice of Claim, arguing that the estate solicitors had deducted fees paid to another firm which he said were properly those of K and L and not of the estate. That is not a matter which requires the Tribunal's ruling. However, what this dispute meant was that Mr Collins, in preventing the sale proceeding, by holding to the notice of claim, was in direct conflict with his staff member solicitor (under his supervision) who was urging for the settlement of the sale on behalf of her purchaser clients, Mrs M and family.

[34] In early February, approximately a fortnight later, the property was on sold to new purchasers for $420,000. That is a profit of $40,000. Mr Collins' firm acted for the vendors on the resale of the property, on Mrs M's instructions. The settlement of that sale occurred on 20 February 2018.

[35] In the course of preparing for the settlement of sale of the Carterton house (the first time), the estate solicitors queried the status of the July EPOA. It was at this point

that Mr Collins realised that the EPOA had not yet been activated, as Mrs W retained legal capacity.

[36] Quite properly, Mr Collins rechecked this position by having Mrs W see another doctor (her general practitioner), who confirmed on 13 February 2018 that Mrs W still had legal capacity.

[37] On 22 February 2018, Mr Collins again saw Mrs W alone to sign an amendment to the existing EPOA to vary it to one which took effect immediately. No steps were taken to regularise any of the decisions which had taken place in the period between the EPOA as first signed on 25 July 2017 and the amended document on 22 February 2018.

[38] Mr Collins did not personally take any steps in relation to the $40,000 profit which had been obtained by Mrs W's family on the resale and says that he was not in fact aware of that figure until the complaint was received.

[39] Thus, he did not turn his mind to whether there had been a breach of fiduciary duty on Mrs M's part towards Mrs W in relation to those transactions, based on the understanding they had that there was an operative EPOA in place.

[40] Mr Collins denies that there was any conflict of interest on his part in the set of transactions, because his duty to Mrs W had ended at the conclusion of the first sale, and she was not a party to the second transaction and therefore he saw himself as independent of her representation.

[41] However, throughout 2018 Mr Collins continued to act for Mrs W via instructions received from Mrs M in relation to the estate disputes. He filed proceedings to have the executors and trustees replaced under Mr W's will and defended a claim made by the stepchildren under the Family Protection Act 1955. These matters were ultimately settled and Mr Collins and Mrs M became the replacement trustees of Mr W's estate.

Levels of liability pleaded

[42] As indicated in the introduction to the decision, there are three levels pleaded as alternatives in this matter.

[43] The first and most serious is misconduct. Although this can arise in a number of ways, the conduct here is alleged to be a wilful or reckless breach of s 4(b) of the Lawyers and Conveyancers Act 2006 (the Act) or of the Rules.[4]

[44] Secondly, the alternative of negligence arises from s 241(c) of the Act, namely negligence or incompetence (in professional capacity) "of such a degree as to reflect on [Mr Collins'] fitness to practise…..or as to bring his profession into disrepute".

[45] Thirdly, the charge may be alternatively considered to meet the provisions of s 12(c) of the Act which provides that a contravention simpliciter of the Act or practice rules has occurred, such as to constitute unsatisfactory conduct of the lawyer.

Discussion of issues

Issue 1: Client Identification

[46] Who is/are the client or clients in the various transactions in which Mr Collins was involved? Mr Collins' primary client, as he would acknowledge, was Mrs W. We do not consider that Mr Collins would dispute the fact that his duty towards her was heightened by her level of vulnerability as a result of her Alzheimer's disease.

[47] We have already set out the transactions and various stages of the legal disputes in which Mr Collins represented Mrs W. He acknowledges that he accepted instructions from her, apart from the three occasions when he saw her by herself, via her sister, Mrs M.

[4] See above n 1. The Rules cited refer to a lawyer's obligations to be independent and free from compromising influences or loyalties or conflicting duties owed to different clients.

[48] On one occasion, Mrs M indicated that she did not want to speak to him about Mrs W's affairs within Mrs W's earshot because she became distressed and for that reason they tried to keep things from her.[5]

[49] Mrs M's own evidence (which was not able to be tested because she declined to attend the hearing to answer questions from the Tribunal), suggested that Mrs W suffered anxiety attacks "when issues were raised" and went on to say in her affidavit *"it was a bit awkward because it was obviously wrong to leave [Mrs W] in ignorance, but by the same token we were alarmed at how stressed she became when we did raise them, so we tried to achieve a balance covering the essential".*

[50] Mr Collins' representation of Mrs W began on 28 June 2017 and continued until all matters were settled in late 2018, including the administration of her late husband's estate, and removal of trustees in that estate.

[51] Other clients are apparent. From 18 January 2018, when Mrs M, her partner and her brother purchased the Carterton home at auction, Mr Collins' firm then acted for those parties directly, rather than merely Mrs M being a conduit for Mrs W's instructions.

[52] It was in the course of Mr Collins' firm's dealing with the estate solicitor on the sale and purchase of the Carterton property that it was discovered that the EPOA was not activated and operative.

[53] It was on behalf of Mrs W that Mr Collins had lodged a notice of claim against the Carterton property. On her behalf, Mr Collins was refusing to discharge the Notice of Claim, as described above at paragraph [33]. As recorded, this dispute meant was that Mr Collins, in preventing the sale proceeding, was in direct conflict with his staff member solicitor (under his supervision) acting on the purchase for Mrs M and family.

[54] Notwithstanding what would appear to be a clear conflict (which is not recognised by Mr Collins), Mr Collins proceeded to prepare an amended EPOA in which he certified himself as an independent witness, specifically "independent of each

[5] (p 492 bundle) An email from Mrs M to Mr Collins on 24 January 2018 said "We need confirmation as, obviously, we can't have [Mrs W] within earshot. She has sadly gotten worse".

of the attorneys". These attorneys included Mrs M, whom his firm was representing as purchaser.

[55] He could not be said to be properly independent at that point and clearly misunderstood his certification.

[56] There is no evidence that Mr Collins advised Mrs W that the property was being sold to family members who on sold at a profit only a few weeks later. Mr Collins said that in taking Mrs W through the A & I process, she would have seen the names of purchasers. We are not in a position to comment on how Mrs W's disability might have impacted on her understanding of this information. What we do know is that she was not told about the profit. And we discuss below how that information was restricted by client confidentiality in any event.

[57] To further complicate matters, the firm was also instructed to act on the (profitable) sale on behalf of Mrs M and family.

[58] In summary, we identified the clients represented by Mr Collins (or his firm) as Mrs W (vulnerable), Mrs M (her attorney), Mrs M's partner and Mrs M's brother.

Issue 2: Divergence of interests?

(a) In respect of the first sale of the Carterton property, there was clearly a divergence of interests, as set out above, between Mrs W, on whose behalf Mr Collins was seeking to enforce a notice of claim, and the purchasers who were also clients, Mrs M and family, who sought to settle the purchase.

(b) In respect of the on sale by the purchaser within two weeks at a significant profit (a $40,000 increase on a $380,000 property is not insignificant), we consider that a further conflict arose in that Mr Collins ought to have followed this transaction and considered whether there was any risk of Mrs M being in breach of her fiduciary duties to Mrs W. There is a clear divergence of interests there. We wonder why Mr Collins' "antennae" were not bristling, particularly in the light of the email from Mrs H, which he had

received only months before raising the issue of financial abuse as a significant concern for Mrs W.

Mr Fowler QC, on behalf of Mr Collins, submitted that the two sale and purchase transactions were separate so that any duty to the vendor in the previous transaction was completed before the profitable sale occurred and therefore there was no conflict. With a vulnerable client in mind, we are not prepared to interpret the transactions in such an unprotective manner. We consider it misunderstands the ongoing nature of professional obligations to a client one has represented and, of course, Mr Collins was still representing Mrs W in respect of many estate issues at this time. A quick profit is suggestive of a possible under-sale, albeit at auction, and it was in the interests of Mrs W, as a beneficiary in the estate and part-owner of the property, to achieve the best possible price.

(c) The other area where divergence of interest is apparent is in witnessing of the amended EPOA, pursuant to s 94A(4) of the PPPR Act[6]. The attorney must be independent. Mr Collins was already acting for Mrs M on the purchase and therefore could not be said to properly certify himself as independent.

Issue 3: Conflict Management

[59] As will be apparent, we consider that a web of conflict of interests is discernible. There is no evidence of Mrs W being given independent advice or sent away as required by r 6.1.2. The evidence is clear that she was not.

[60] In fact, she was kept away from the auction, because it would be upsetting, and told the bare minimum.[7]

[61] We consider that email and the warning from Mrs H ought to have alerted Mr Collins to check that Mrs W fully understood what was happening, and in particular that the property, which was bought for reserve price by her family members, was on sold at a profit. Given that client privilege (held by Mrs M and family) would have

[6] See above n 2.
[7] See above n 4.

prevented Mr Collins from telling Mrs W about the profit, and at least the possibility of a breach of duty by Mrs M, there was no alternative but for her to be sent away for independent representation.

[62] Mr Collins says that there is no evidence that he did not take the warning of undue influence in July 2017 seriously. The only evidence we have is that, in less than an hour, he had sent the email to the person in respect of whom the undue influence was alleged. We consider it can be inferred from that that he took little or no time to weigh the information in the email, notwithstanding the other indications (red flags) by the radical changes made to Mrs W's will (excluding her two stepchildren whom she had raised for 25 years)[8] and their removal from roles as her attorneys. It would seem he made no further enquiries in this regard. He certainly did not tell the Tribunal that he had. He did not talk with Mrs H who had sent the email. Sending the email to Mrs M demonstrated a partisan approach. Mr Collins had apparently made his choice and trusted Mrs M, despite the warning.

[63] Subsequently, payments were made by Mr Collins' firm into a joint bank account for Mrs W and Mrs M on Mrs W's behalf, (at Mrs M's request)[9]. There was no written authority from Mrs W for these funds to be paid to a joint account and we consider this to be an aggravating feature.

[64] However, we do note that it is common practice for banks to suggest joint accounts in the circumstances as existed here, and that this approach does not assist legal firms in maintaining carefully separated trust funds for their clients. For these reasons, we would only regard this as moderately aggravating.

Level of liability

(a) Misconduct

[65] While we have been critical of Mr Collins in respect of his failure to recognise the conflicts which were present, we do not consider that his conduct rises to the level of a "reckless disregard" of the Rules. We accept that he intended to protect his client, but failed to appreciate red flags and that she was at risk when they occurred.

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[8] And in contrast to the mutual wills she and her late husband had previously signed, whereby all children were treated equally.
[9] BOD p 500.

[66] Therefore, we do not consider the level of misconduct has been reached in this particular instance.

(b) Negligence

[67] The definition of negligence was discussed in the leading case of *W v Auckland Standards Committee 3*, in which Duffy J was upheld in her description of negligence by the Court of Appeal:

> "We see no error in the approach which Duffy J adopted in the present case of considering whether reasonable members of the public, informed of all relevant circumstances, would view W's conduct as tending to bring the profession into disrepute. We agree to that the issue is necessarily to be approached objectively, taking into account the context in which the relevant conduct occurred." [10]

[68] We consider that a reasonable member of the public, informed of the circumstances of this case, would be deeply concerned about Mr Collins' failure to spot what we have referred to as red flags and discernible conflicts. We consider that, while it does not go so far as to reflect on Mr Collins' fitness to practice, we do consider it would bring the profession into disrepute in the eyes of a reasonable member of the public, aware of all the circumstances.

[69] Thus, we consider that the standard of negligence, pursuant to s 241(c) of the Act, has been reached on the balance of probabilities.

(c) Unsatisfactory Conduct

[70] If we are wrong in our finding of negligence, we would say that there has been clear contravention of the Rules as to practitioner loyalties and conflict of duties, as discussed above, and that as such, a finding of unsatisfactory conduct is inevitable.

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[10] *W v Auckland Standards Committee* [2012] NZCA 401, at [45].

Directions

1. A penalty hearing is to occur on the finding of negligence. Half a day is to be allocated for this purpose or, with the consent of both counsel, a remote hearing is to be convened.

2. Counsel for the Standards Committee to file penalty submissions 14 days in advance of any allocated hearing.

3. Counsel for the practitioner to file penalty submissions 7 days in advance of the allocated hearing.

DATED at AUCKLAND this 30th day of June 2022

DF Clarkson
Chairperson