NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 3
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 K Raureti
Ms S Sage
Prof D Scott

DATE OF HEARING 1 February 2023

HELD AT By remote hearing

DATE OF DECISION 20 February 2023

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

RESERVED DECISION OF THE TRIBUNAL GIVING REASONS FOR PENALTY

Introduction

[1] This decision follows the making of orders on 9 February 2023. With the agreement of counsel, we issued those orders promptly, with reserved reasons to follow. This decision provides those reasons.

Principles

[2] The principles underlying imposition of penalty in professional disciplinary cases are now well understood. Overarching the consideration of penalty are the purposes of the legislation[1] which must be implemented by the Tribunal, namely the public protective role and the upholding of professional standards, as set out in s 3(1) of the Act.[2]

[3] In addition, the cases have referred to the rehabilitative functions of penalty, principles of general and specific deterrence, and the need for the public to observe that a profession's disciplinary body is providing a significant response to conduct which has fallen well below expected and prescribed standards.

[4] However, the Tribunal is also mindful that any penalty imposed must represent the least restrictive intervention necessary to reflect the seriousness of the offending.[3]

[5] The exercise in establishing a proportionate response begins with the assessment of the seriousness of the conduct. There is then a consideration of aggravating and mitigating factors. Finally, there is a need to consider penalties imposed in previous comparable cases, in order to achieve consistency to the extent possible, having regard to the many different context in which offending occurs.

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[1] Lawyers and Conveyancers Act 2006.

[2] The purposes of this Act are—
(a) to maintain public confidence in the provision of legal services and conveyancing services:
(b) to protect the consumers of legal services and conveyancing services:
(c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

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

[6] The seriousness of the conduct, as found by the Tribunal, is outlined in our liability decision of 30 June 2022.

[7] Although we declined to find misconduct, we found that the standard of negligence had been reached and we highlighted a number of areas of concern.

[8] In summary, we found that Mr Collins had fallen short of his obligations in respect of the following areas:

1. The manner in which he treated an allegation of possible undue influence upon his client and consequent risk of financial abuse.

2. His failure to recognise a conflict of interests following the sale of his client's property to family members, including the person who had been appointed under an Enduring Power of Attorney (EPOA) to represent Mr Collins' client, and in which transaction Mr Collins' firm also acted for the purchaser.

3. The manner in which he corrected an error in the EPOA by simply amending it to be one which was operative immediately, the sale process having already occurred at this stage, with the involvement of the attorney as the contact person providing Mr Collins with instructions. In the course of so correcting, by simply amending the previous EPOA to become operative from its commencement, Mr Collins had failed to recognise that by that time he was not able to certify himself as independent, given that his firm was now acting for the proposed attorney (in the sale and on-sale transactions).

[9] We consider these to be serious defaults, albeit unintentional. We accept Mr Fowler's submission that his client at all times considered that he was actively advocating for and protecting his client, who was a vulnerable person in the early stages of Alzheimer's dementia. We also accept that the practitioner was careful in obtaining medical evidence to demonstrate that his client still had decisional capacity, although that status would seem somewhat theoretical, given that the client had delegated decision-making to her attorney, who then had most of the dealings with Mr Collins.

[10] In our decision, we referred to a web of conflict of interests and we do not propose to repeat what is set out in the liability decision. However, we note that this description is challenged on behalf of Mr Collins by his counsel, who submitted that although there was a direct conflict of interest from the point of the sale having occurred following auction, this was resolved and there was only an "emerging conflict" later in the same year.

[11] Mr Fowler accepted that his client was incorrect in purporting to independently certify the second or varied EPOA. Mr Fowler also submits that it is either a mitigating feature or diminishes the level of culpability that Mr Collins was not aware of the $40,000 profit on the on-sale achieved by the attorney and her family within two weeks of purchase. Because another staff member was handling the conveyancing files, Mr Collins says he was not aware of this fact until the complaint was made.

[12] Mr Fowler also defended his client's decision to forward the email, which warned of undue influence and financial abuse, to the person about whom that allegation was being made rather than to his client directly. Mr Collins says that he had an obligation to pass on such information in terms of the Conduct and Client Care Rules,[4] which incorporated the *McKaskell* decision.[5]

[13] This obligation of course could be seen differently. Had Mr Collins seen the allegation as a genuine concern, he could be said to have failed his client by not directly discussing this with her alone, rather than sending it to the person about whom the concern had been raised, namely her proposed attorney.

[14] Unfortunately, Mr Collins was unable to point to any notes kept of the only separate meetings he had with Ms W, although he assured us he had diligently covered all of the relevant issues. He was unable to elaborate under cross-examination specifically what areas had been covered.

[15] Taking account of all of those matters, we do consider that this is a relatively serious example of negligence when viewed overall, particularly when taking into account the conflicts discerned.

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[4] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[5] *McKaskell v Benseman* [1989] 3 NZLR 75.

Aggravating and mitigating features

[16] Mr Collins cannot claim the advantage of coming to the Tribunal with an unblemished record, there having been a finding of unsatisfactory conduct against him in 2016. However, we do note the point that Mr Fowler made about this finding, which involved the actions of a staff member, rather than Mr Collins himself, in failing to honour an undertaking and Mr Collins, as the supervising partner, took responsibility, rather than it having been his personal default.

[17] Ms Pender also put forward as an aggravating feature Mr Collins' apparent lack of remorse and inability to accept, other than belatedly and in a very limited way, the conflict of interests error.

[18] Again, Mr Fowler disputes that his client has demonstrated a lack of insight. Mr Fowler submits that his client did not deny that there was a possible conflict but pointed to issues of timing as minimising this failure.

[19] As Mr Fowler rightly points out, the rules do permit a practitioner to act for vendor and purchaser in one transaction in specified circumstances. However, it is clear that given the vulnerability of his client, he ought to have declined to do so in this case. Despite the property having been sold at auction at a figure which was said to exceed a registered valuation, Mr Collins' firm could have declined to act for the purchaser (attorney for his client), and would have been wise to have done so.

[20] As to mitigating features, we do accept that Mr Collins has had a long and, other than the one finding against him, successful career and that he has now retired and thus there are no issues of public protection involved which relate to him personally.

[21] There is, however, a need to denounce and deter other practitioners from the errors which Mr Collins fell into at this very late stage of his career.

Comparable cases

[22] Although three cases were put to us by Ms Pender at the hearing, she, quite properly, only relied in a significant way upon the *Graves* decision. We agree that that is the closest comparable case and indeed, at a very similar level of culpability. In that

matter, Mr Graves came to the Tribunal with an unblemished record, and he was censured and fined $10,000 together with costs. However, we note that the costs in Mr Graves' case were at a significantly lower level than in the present matter and we take account of that in fixing the fine which is appropriate for Mr Collins.

[23] We also accept the submission made by Mr Fowler that, in not seeking name suppression and experiencing the ignominy of these findings at the very end of his career, Mr Collins has suffered a significant penalty in respect of this conduct already.

[24] We consider that a censure is also required in this matter, given that such carries an educative component for the rest of the profession. We consider that a censure is an important disciplinary response in upholding professional standards.

Costs

[25] We consider that it is proper to discount the costs payable by Mr Collins to some extent to reflect the duplication in work which is conceded to have occurred because of the piecemeal and drawn-out manner in which this case has, unfortunately, proceeded. Although it can be said that by so strongly defending the matter, Mr Collins has increased the costs, for example, had the conflict of interests been conceded at an earlier time, this might not have required as much hearing time. However, we do recognise that this process has been beset with difficulties. We reflect this in the discount of the Standards Committee costs to the sum of $45,000.

Censure

[26] Mr Collins, in this matter you did not recognise, and for too long failed to accept, the point at which you became at risk of conflicted loyalties in acting for your clients. In doing so, you breached the Lawyers Conduct and Client Care Rules.

[27] Lawyers have a high level of responsibility when acting for clients, especially if those clients are more vulnerable to persuasion, undue influence or fraud due to their physical, mental or emotional condition. You took no steps to check with your client in person, on her own, when potential undue influences were brought to your attention. Accordingly, you did not discharge your obligations to your client with due

consideration and awareness of all potential vulnerabilities. Rather, we infer from your actions that you were somewhat dismissive of the warning.

[28] Having your client Donor amend the Enduring Power of Attorney for Property, to change when it came into effect, some six months after it was originally signed, resulted in you completing a further certificate which was inaccurate because you were no longer independent of the attorney at the time of the amendment. This is poor practice and falls short of the duty of care owed to your client.

Summary of orders

[29] The following orders were made on 9 February 2023:

(a) Mr Collins is formally censured. The terms of the censure are now recorded in paras [26]-[28] of this decision (pursuant to ss 242(1)(a) and 156 of the Act).

(b) A fine of $8,000 is imposed (pursuant to ss 242(1)(a) and 156 of the Act).

(c) Mr Collins is to pay $45,000 towards the Standards Committee costs (pursuant to s 249 of the Act).

(d) The New Zealand Law Society is to pay the costs of the Tribunal. These costs are now certified in the sum of $15,362 (pursuant to s 257 of the Act).

(e) Mr Collins is to reimburse the New Zealand Law Society for the Tribunal costs in full. These costs are now certified in the sum of $15,362 (pursuant to s 249 of the Act).

DATED at AUCKLAND this 20th day of February 2023

DF Clarkson
Chairperson